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# DRAFT

OF A

# CIVIL CODE

FOR THE

# STATE OF NEW YORK;

PREPARED BY

THE COMMISSIONERS OF THE CODE,

AND

SUBMITTED TO THE JUDGES AND OTHERS FOR EXAMINATION,
PRIOR TO REVISION BY THE COMMISSIONERS.

---

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THE

# CIVIL CODE

OF THE

# STATE OF NEW YORK.

---

## AN ACT
## TO ESTABLISH A CIVIL CODE.

---

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

### GENERAL DEFINITIONS AND DIVISIONS.

SECTION 1. Title of Code.
2. Definition of law.
3. Action of sovereign power.
4. Two kinds of laws.
5, 6. Customary law.
7. Two kinds of civil rights.
8. Rights, how modified.
9. Divisions of the Civil Code.

SECTION 1. This act shall be known as the CIVIL CODE OF THE STATE OF NEW YORK. **Title of Code.**

§ 2. Law is a rule of property and conduct prescribed by the sovereign power of the state. **Definition of law.**

§ 3. The sovereign power for this purpose acts: **Action of sovereign power.**

1. By constitution or organic acts of the people;

2. By acts of the legislature, or of other and subordinate legislative bodies;

3. By enforcing through the tribunals those rules which, though not enacted, form what is known as customary law.

Two kinds of law.

§ 4. Customary law is divided into:

1. Public law or the law of nations;

2. Domestic or municipal law.

Customary law.

§ 5. The evidence of the customary law is found in the decisions of the tribunals.

Id.

§ 6. In this state there is no customary law, in any case, so far as the same is provided for by the five Codes.

Two kinds of civil rights.

§ 7. All original civil rights are either:

1. Rights of person, or,

2. Rights of property.

Rights, how modified.

§ 8. Rights of property and of person may be waived,[1] surrendered or lost by neglect, in the cases provided by law.

[1] Conkling *v.* King, 10 *N. Y.*, 440.

Divisions of the Civil Code.

§ 9. This Code is divided into four general divisions:

1. The first relates to Persons;

2. The second to Property;

3. The third to Obligations;

4. The fourth contains General Provisions relating to Persons, Property and Obligations.

# DIVISION FIRST.

## PERSONS.

---

PART I. Persons.
II. Personal Rights.
III. Personal Relations.

---

## PART I.

### PERSONS.

SECTION 10. Definition of a minor.
11. Definition of an adult.
12. Unborn child.
13. Persons of unsound mind.
14. Custody of minors and insane persons.
15. Powers of minors.
16. Minors and persons of unsound mind may make contracts for necessaries.
17. Rescission of contracts of minors.
18. Executed contracts of insane persons.
19. Powers of persons whose mental incapacity has been adjudged.
20. Wrongs.
21. Indians.

§ 10. A minor is a person under the age of twenty-one years. **Definition of a minor.**

§ 11. All others are adults. **Definition of an adult.**

§ 12. A child begotten, but not yet born, is to be deemed an existing person, so far as necessary for its interests in **Unborn child.**

the contingency of its subsequent birth; but not for any other purpose.

Marsellis v. Thalheimer, 2 *Paige*, 35; Jenkins v. Freyer, 4 *id.*, 47; Hone v. Van Schaick, 3 *Barb. Ch.*, 488.

Persons of unsound mind.

§ 13. Idiots, lunatics, habitual drunkards and imbeciles, are to be treated as persons of unsound mind, in the cases provided by law.

Custody of minors and insane persons.

§ 14. Until a guardian is appointed, the custody of the person of one who is a minor or mentioned in the last section, belongs to the father and mother jointly, or to the survivor of them, except in those cases where the tribunals otherwise award the custody, and except where the person is married, or having been married has children who are of age.

Powers of minors.

§ 15. A minor cannot make an executory contract or give a delegation of power;[1] but if he assumes to do so, he may affirm the same after he comes of age.[2]

[1] Bool v. Mix, 17 *Wend.*, 119; Gillett v. Stanley, 1 *Hill*, 121; Stafford v. Roof, 9 *Cow.*, 626, reversing S. C., 7 *id.*, 179.

[2] Everson v. Carpenter, 17 *Wend.*, 419; Taft v. Sergeant, 18 *Barb.*, 320; Wood v. Gosling, 1 *N. Y. Leg. Obs.*, 74; Palmer v. Miller, 25 *Barb.*, 399.

Minors and persons of unsound mind may make executed contract for necessaries

§ 16. A minor or a person of unsound mind of whatever degree[1] may bind himself to pay for things necessary for his support[2] when he is not under the care of a parent[3] or guardian[4] who is able to provide for him.

[1] Taylor v. Baldwin, 9 *N. Y.*, 45.

[2] Smith v. Oliphant, 2 *Sandf.*, 306; Randall v. Sweet, 1 *Den.*, 460.

[3] Walling v. Toll, 9 *Johns.*, 141.

[4] Kline v. L'Amoureaux, 2 *Paige*, 419.

Rescission of contracts of minors.

§ 17. In any other case than that mentioned in the last section, a minor who enters into a contract, may avoid the same within a reasonable time after coming of age,[1] upon restoring the consideration to the other party;[2] even though he had fraudulently alleged that he was of full age.[3] But

he cannot so avoid obligations entered into by him under the authority or requirement of the law.[4]

[1] Taft *v.* Sergeant, 18 *Barb.*, 320.
[2] Bartholemew *v.* Finnemore, 17 *id.*, 428.
[3] Conroe *v.* Birdsall, 1 *Johns. Cases*, 127.
[4] This is intended to provide for such cases as the execution of a bond in bastardy proceedings, or a voluntary assignment under the statute relating to the imprisonment of insolvent debtors, or an enlistment.

Executed contracts of insane persons.

§ 18. A person of unsound mind, of whatever degree,[1] except in case of an entire defect of understanding,[2] may before his incapacity has been judicially determined, make a contract, subject to the power of the tribunals to declare it void, or to exonerate him from its obligations.

[1] Thus a mortgage by a lunatic is at most voidable. Ingraham *v.* Baldwin, 9 *N. Y.*, 45; 12 *Barb.*, 9. The mere existence of lunacy does not revoke a power. Wallis *v.* Manhattan Co., 2 *Hall*, 495.
[2] Jackson *v.* King, 4 *Cow.*, 207; Person *v.* Warren, 14 *Barb.*, 488.

Powers of persons whose mental incapacity has been adjudged.

§ 19. After his incapacity has been judicially ascertained, such person can make no contract, nor delegate any power, nor waive any right, until his restoration to capacity is judicially ascertained.

Wrongs.

§ 20. A minor, or a person of unsound mind, of whatever degree, is liable in damages for a wrong done by him, like any other person, but cannot be subjected to exemplary damages, unless at the time of the act he was capable of knowing that the act was unlawful.

Krom *v.* Schoonmaker, 3 *Barb.*, 647.

Indians.

§ 21. Indians resident within this state have the same rights and duties as other persons; except that

1. They cannot vote or hold office;

2. They cannot sell or convey Indian lands, except in the cases provided by special laws. But Indians may acquire lands by purchase or otherwise from other persons, and they and their heirs and assigns may sell and convey

lands so acquired to Indians or other persons, in the same manner as citizens.

NOTE.—The course of legislation and of decision, following the modifications which time has made in the actual condition of the Indians, is such that, by the act of 1843, Indians are authorized to purchase, hold and convey lands; and such as become freeholders to the value of $100, are liable on contracts and to taxation and the jurisdiction of the courts, as if citizens. There seems to be no sufficient reason why a simple general provision like that here proposed, should not now be adopted.

# PART II.

## PERSONAL RIGHTS.

SECTION 20. General personal rights.
21. Protection to reputation.
22. Defamation defined.
23. Slander.
24. Malice, when presumed.
25. What communications are privileged.

General personal rights.

§ 20. Besides the personal rights mentioned or referred to in the Political Code, every person has, subject to the qualifications and restrictions provided by law, the right of protection from bodily restraint and harm, or menace, and from injury to his good name and his family relations.

Protection to reputation.

§ 21. The right of protection from injury to good name extends to all communications by words, written or spoken, or by signs, injurious to the moral, social, professional, or industrial character of the individual, except that no person can be made civilly responsible for publishing that which is true.

Defamation defined.

§ 22. A malicious injury[1] to good name is called defamation.

Oral defamation is called slander.

All other is libel.[2]

[1] Falsity does not enter into the definition, for it is not always material in criminal prosecutions; which will be treated in the PENAL CODE.

[2] Libel has been variously defined, as follows: A censorious or ridiculing writing, picture or sign, made with a mischievous and malicious intent towards government, magistrates or individuals. Alexander Hamilton, in People *v.* Croswell, 3 *Johns. Cas.*, 337, approved in Steele *v.* Southwick, 9 *Johns.*, 214; Cooper *v.* Greeley, 1 *Denio*, 347.

A malicious publication, expressed either in printing or writing, or by signs and pictures, tending either to blacken the memory of one dead, or the reputation of one who is alive, and expose him to public hatred, contempt, and ridicule. Ryckman *v.* Delavan, 25 *Wend.*, 186; Root *v.* King, 7 *Cow.*, 613; affirmed, 4 *Wend.*, 113; 4 *Mass.*, 168, approved in 2 Kent's Com., 17, marg.

Anything written of another, which holds him up to scorn and ridicule, or might reasonably be considered as provoking him to a breach of the peace, is a libel. Stone *v.* Cooper, 2 *Denio*, 293; *Holt*, 223.

Slander.

§ 23. An oral communication which is false is to be deemed injurious to good name, in any of the following cases:

1. When it imputes a charge which, if true, would subject the person to an indictment for a crime involving moral turpitude, or subject him to infamous punishment;

Young *v.* Miller, 3 *Hill*, 21, and cases cited.

2. When it imports that he has been subjected to bodily punishment as a criminal;

Smith *v.* Stewart, 5 *Barr* (*Penn.*), 372.

3. When it imputes the present existence of an infectious, contagious or loathsome disease.

Williams *v.* Holdredge, 22 *Barb.*, 376, and cases cited.

4. When it tends directly to injure one in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office, profession, or other occupation peculiarly requires; or by imputing something with reference to his trade or business that has a natural tendency to lessen its profit.

5. When it imputes impotence or a want of chastity.

This provision is new.

6. In any other case where it is shown to have caused actual damage;

Malice, when presumed.

§ 24. A false and injurious communication is presumed to be malicious, if no justifiable motive for making it is shown.

Lewis *v.* Chapman, 16 *N. Y.*, 369; Hunt *v.* Bennett, 19 *Id.*, 173.

What communications are privileged.

§ 25. A communication made to a person interested in the communication, by one who was also interested or who stood in such a relation to the former as to afford a reasonable ground for supposing his motive innocent, is not presumed to be malicious; and is called a privileged communication.[1]

No person is liable for publishing a fair and true report in a newspaper, of any judicial, legislative or other public official proceeding, or of anything said in the course of the same, except upon extrinsic proof of actual malice.[2]

[1] Lewis *v.* Chapman, 16 *N. Y.*, 369.

[2] Laws of 1854, ch. 130.

# PART III.

## PERSONAL RELATIONS.

TITLE I. Marriage.
II. Parent and Child.
III. Master and Servant.
IV. Guardian and Ward.

## TITLE I.

### MARRIAGE.

CHAPTER I. The Contract of Marriage.
II. Divorce.
III. Husband and wife.

## CHAPTER I.

### THE CONTRACT OF MARRIAGE.

SECTION 26. Definition of marriage.
27. Consent, how proved.
28. Persons capable of marriage.
29. Consent must be given to a present marriage.
30. Certain marriages incestuous.
31. Certain marriages, when to be deemed void.
32. Polygamy forbidden.
33. Conjugal rights, &c., not restored by pardon.
34. Mode of authenticating marriages.
35. Form of marriage.
36. Duties of the officer before whom a marriage is solemnized.
37. Solemnizing a marriage of persons disqualified by non-age or insanity is a misdemeanor.
38. Certificate to be given to either contracting party, if desired.
39. The certificate.
40. The entry thereof.
41. Authentication of the certificate.
42. Certificate, entry, &c., evidence.
43. Marriages of Indians.

Definition of marriage.

§ 26. Marriage is a personal relation, arising out of a civil contract to which the consent of parties capable of making it is alone necessary.

By 2 R. S., 138, § 1, marriage is declared to be a civil contract to which consent is necessary; but whether anything more than consent is necessary has been mooted; some authorities deeming that either consummation or solemnization is also requisite. Jaques *v.* Public Administrator, 1 *Bradf.*, 499; and see 1 Parsons on Contracts, 560. This provision makes consent alone sufficient, and this is in accordance with the views declared in Starr *v.* Peck, 1 *Hill*, 270, and Jackson *v.* Winne, 7 *Wend.*, 47.

Consent, how proved.

§ 27. The consent may be proved like any other fact.

Starr *v.* Peck, 1 *Hill*, 270; Clayton *v.* Wardell, 4 *N. Y.*, 230.

Persons capable of marriage.

§ 28. Any unmarried male of the age of fourteen years or upwards, and any unmarried female of the age of twelve years or upwards, and not otherwise disqualified, is capable of giving such consent; subject, however, to the provision of subdivision 3 of section 42 of this Code.

NOTE.—Bennett *v.* Smith, 21 *Barb.*, 439. The reference is to the provision below, allowing a divorce where a female is married under fourteen against consent of parent or guardian.

Consent must be given to a present marriage.

§ 29. The consent must be to a present marriage, commencing instantly, and not an agreement to marry afterwards.

Cheney *v.* Arnold, 15 *N. Y.*, 345.

Certain marriages incestuous.

§ 30. Marriage between parents and children, including grandparents and grandchildren of every degree, ascending and descending, and between brothers and sisters of the half as well as of the whole blood, are incestuous and absolutely void: and this whether the relationship is legitimate or not.

2 R. S., 139, § 3.

§ 31. If either party to a marriage is incapable of consent for want of age or understanding, the marriage is void from the beginning: if either is incapable, from physical causes, of entering into the marriage state, or if such con-

sent is obtained by force or fraud, the marriage is void from the time its nullity is declared by a court of competent authority.

2 R. S., 139, § 4; modified by declaring marriages of parties incapable of giving consent, void from the beginning, to harmonize with section 26, which requires the consent of a party *capable of consent*. As to the difficulty attending the construction of the former statute, See Jaques *v.* Public Administrator, 1 *Bradf.*, 499.

Polygamy forbidden.

§ 32. A subsequent marriage contracted by any person during the life of a former husband or wife of such person, is illegal and absolutely void, unless

1. The former marriage had been annulled or dissolved for some cause other than the adultery of such person; or,

2. Unless such former husband or wife had been finally sentenced to imprisonment for life; or,

3. Unless such former husband or wife was absent, and not known to such person to be living, for the space of five successive years previous to such subsequent marriage; in which case the subsequent marriage is void only from the time it is adjudged void.

2 R. S., 139, §§ 5, 6. The language of subdivision 3 has been modified to make it appropriate to the retrospective effect given to section 6, by the construction adopted by the Court of Appeals in Bowers *v.* Brower, 9 *N. Y. Leg. Obs.*, 196.

Conjugal rights, &c., not restored by pardon.

§ 33. No pardon granted after the twelfth day of April, one thousand eight hundred and twenty-two, to any person sentenced to imprisonment for life in this state, restores such person to the rights of any previous marriage, or to the guardianship of any issue of such marriage.

2 R. S., 139, § 7.

Mode of authenticating marriages.

§ 34. For the purpose of authentication, according to the provisions of this title, marriages must be solemnized only by the following persons: Ministers of the gospel and priests of every denomination; mayors, recorders and aldermen of cities; judges of the county courts and justices of the peace; and, in the case of Indians, also the peacemakers acting within their respective jurisdictions.

2 R. S., 139, § 8; applied to Indians by the Laws of 1849, ch. 420, § 4.

NOTE.—In 2 Kent's Com., 89, note, it is said that these provisions of the Revised Statutes are not laws, because by the act of 1830, which declared that marriages contracted without this form of solemnization should be valid, they no longer are required to be obeyed. They are here embodied, however, for the obvious reason that, though solemnization is not compulsory, it is optional, and the form prescribed may be and constantly is resorted to to obtain the convenient authentication which it affords of the contract.

Form of marriage.

§ 35. No particular form is required, but the parties must solemnly declare in the presence of the person solemnizing the marriage, and at least one witness, that they take each other as husband and wife.

2 R. S., 139, § 9.

Duties of the officer before whom a marriage is solemnized.

§ 36. The minister or magistrate, required to solemnize a marriage must ascertain:

1. The christian and surname, and places of residence of the parties, and that they are of sufficient age to be capable of contracting marriage;

2. The name and place of residence of the witness, or of two witnesses if more than one is present.

He must enter the facts so ascertained, and the date of the solemnization, in a book to be kept by him for that purpose. If either of the parties to the marriage is not personally known to him, he must ascertain, to his satisfaction, their identity.

2 R. S., 140, §§ 10, 11.

Solemnizing a marriage of persons disqualified by age or insanity is a misdemeanor.

§ 37. Every minister or magistrate who solemnizes a marriage where either party, within his knowledge, is under the age of legal consent, or an idiot or lunatic, or to which, within his knowledge, any legal impediment exists, is guilty of a misdemeanor.

2 R. S., 140, § 12. This may be transferred to the Penal Code.

Certificate to be given to either contracting party, if desired.

§ 38. The minister or magistrate by whom any marriage is thus solemnized within this state must furnish, on request, to either party a certificate thereof, signed by him, specifying:

1. The names and places of residence of the parties married, and that they were known to such minister or magis-

trate or were satisfactorily proved, by the oath of a person known to him, to be the persons described in such certificate, and that he had ascertained that they were of sufficient age to contract marriage;

2. The name and place of residence of the attesting witness or witnesses; and,

3. The time and place of such marriage;

4. The certificate must also state that, after due inquiry made, there appeared no lawful impediment to such marriage.

2 R. S., 140, § 13.

The certificate.

§ 39. Such certificate may, within six months after the marriage, be filed with the clerk of the city or town where the marriage was solemnized or where either of the parties reside, and is to be entered in a book to be provided by the clerk, in the alphabetical order of the name of each party, and in the order of time in which it is filed.

The entry thereof.

§ 40. The entry must specify:

1. The name and place of residence of each party;

2. The time and place of marriage;

3. The name and official station of the person signing the certificate; and,

4. The time when the certificate was filed.

Authentication of the certificate.

§ 41. If the certificate was signed by a minister or priest, there must be indorsed or annexed, before filing, a certificate of any magistrate residing in the same county with such clerk, that the minister, by whom it is signed, is personally known to such magistrate, and has acknowledged the execution of the certificate in his presence; or, that the execution of such certificate, by a minister or priest of some religious denomination, was proved to such magistrate, by the oath of a person known to him, and who saw the certificate executed.

2 R. S., 141, §§ 14–16.

Certificate, entry, &c., evidence.

§ 42. Such certificate, or the entry thereof made as above directed, or a copy of such certificate or of such entry, duly certified, is presumptive evidence of the fact of such marriage.

2 R. S., 141, § 17.

Marriages of Indians.

§ 43. Indians contracting marriage according to the Indian custom, and cohabit as husband and wife, are lawfully married, and their children are legitimate.

Laws of 1849, ch. 420, § 4.

## CHAPTER II.

### DIVORCE.

NOTE.—The provisions of this chapter have been modified from those of the Revised Statutes, with a view to produce conformity with the present Procedure, and to establish the rule that in one action between husband and wife, in which a judgment of nullity or a dissolution of marriage or separation is sought, the whole controversy may be passed on and settled, and for this purpose to allow a defendant to interpose a demand for affirmative relief, asking a divorce or separation against the plaintiff, instead of requiring cross actions.

ARTICLE I. Nullity.
II. Dissolution.
III. Separation.
IV. General Provisions.

## ARTICLE I.

### NULLITY.

SECTION 44. Cases where marriages may be annulled.
45. Marriages during life of former husband or wife, how annulled.
46. Applications for a decision of nullity.
47. Cohabitation, when a bar.
48. Children of annulled marriages.
49. Actions to annul marriage.
50. Effect of judgment of nullity.

Cases where marriages may be annulled.

§ 44. A marriage contract may be adjudged void for either of the following causes existing at the time of the marriage:

1. If the party seeking to have the marriage adjudged void, was under the age of legal consent; but a marriage is not to be adjudged void on this account if it appears that after attaining the age of consent, the party for any time freely cohabited with the other as married;

2 R. S., 142, §§ 20, 21.

2. If the former husband or wife of either party was living, and the marriage with such former husband or wife was then in force;

3. If the wife was under the age of fourteen years, and the marriage was without the consent of the person having the legal charge of her person, and was a punishable offense on the part of the husband; but a marriage is not to be adjudged void on this account except on behalf of the wife, nor unless it is shown that the marriage was not followed by consummation or cohabitation, and that it has not been ratified by any mutual assent of the parties since the wife attained the age of fourteen years;

Laws of 1841, ch. 257; same stat. 3 R. S., 6th ed., 233, § 34.

4. If either party was of unsound mind;

5. If the consent of either party was obtained by force or fraud;

6. If either party was physically incapable of entering into the married state; but a marriage is not to be adjudged void on this account unless it appears to the satisfaction of the court that the incapacity continues and is probably incurable.

2 R. S., 142, § 20; the last clause is new but in accordance with the decisions in Devanbagh *v.* Devanbagh, 5 *Paige*, 554; 6 *id.*, 175.

Marriages during life of former husband or wife, how annulled.

§ 45. A marriage which is void or voidable on the ground that a former husband or wife of one of the parties was living, may be adjudged void on the application of such former husband or wife, or upon the application of either of the parties during the life of the other, and within the time limited by law.

2 R. S., 142, § 22. The words "within the time limited by law" have been inserted in accordance with the construction put upon a similar provision (§ 30), in Montgomery *v.* Montgomery, 3 *Barb. Ch.*, 132, where it was held that the intent of the reference, to the lifetime of the parties, was to prohibit the annulling of the marriage after the death of the parties, but not to extend the limitation to any period within the lifetime of the other.

Applications for a decision of nullity.

§ 46. Within the time limited by law for the commencement of actions, application to annul a marriage may be made:

1. If on the ground that a former husband or wife was living,—by either party during the life of the other, or by such former husband or wife;

2. If on the ground of idiocy,—by any relative of the idiot, interested to avoid the marriage, during the life of either party;

3. If on the ground of any insanity, other than idiocy,—by any relative interested to avoid the marriage, and at any time during such insanity, or after the death of the insane person in that state, and during the life of the other party; or by the insane person after the restoration of reason;

4. If on the ground of force or fraud,—by the injured party, or the parent or guardian of such party, or a relative interested to avoid the marriage, during the life of either party;

5. In either of the foregoing cases, if no application has been made by the party or a relative, application may be made at any time during the life of both parties, by a guardian of the insane or injured party appointed by the court for the purpose;

6. If on the ground of physical incapacity,—application can only be made by the injured party against the incapacitated party, and in all cases must be made within two years from the time of contracting the marriage.

2 R. S., 142, §§ 22, 24, 27, 30, 33.

Cohabitation, when a bar.

§ 47. After an insane person has been restored to reason the marriage cannot be annulled upon his or her application upon the ground of such insanity, if it appears that the parties freely cohabited as husband and wife, after such restoration; nor can any marriage be annulled on the ground of force or fraud, if it appears that at any time before the commencement of the action, the parties freely cohabited as husband and wife.

2 R. S., 143, §§ 27, 31.

Children of annulled marriages.

§ 48. Where a marriage is adjudged void on the ground that a former husband or wife was living, and it is adjudged

that the subsequent marriage was contracted in good faith, and with the full belief of the parties that the former husband or wife was dead; or where a marriage is adjudged void on the ground of insanity; issue, begotten before the judgment must be specified in the judgment, and are entitled to succeed in the same manner as legitimate children, to the estate of the parent, who, at the time of the marriage, was competent to contract. The court must award custody of the issue of a marriage annulled on the ground of force or fraud, to the innocent parent, and may also provide for their education and maintenance out of the property of the guilty party.

2 R. S., 142, §§ 23, 28, 32.

Actions to annul marriage.

§ 49. Applications to adjudge marriages void, shall be made in civil actions according to the Code of Civil Procedure. No marriage can be adjudged void solely on the declarations or confessions of the parties; but the court must in all cases require other satisfactory evidence of the existence of the material facts.

2 R. S., 144, § 36.

Effect of judgment of nullity.

§ 50. A judgment of nullity of marriage, recovered during the life of the parties, is conclusive evidence of its nullity, in all courts and proceedings; but if recovered after the death of either party to the marriage, it is only conclusive as against the parties to the action, and those claiming under them.

2 R. S., 144, § 37.

## ARTICLE II.

### DISSOLUTION.

SECTION 51. Divorce for adultery.
52. Cases in which divorce for adultery is denied.
53. Legitimacy of issue.
54. When re-marriage is forbidden.

Divorce for adultery.

§ 51. Divorces may be decreed, and marriages may be dissolved by any court of competent jurisdiction, wherever adultery has been committed by any husband or wife, in either of the following cases:

1. Where both husband and wife were actual inhabitants of this state, at the time of the commission of the offense;

2. Where the marriage was contracted or solemnized within this state, and the injured party, at the time of the commission of the offense, and at the commencement of the action, was an actual inhabitant of this state;

3. Where the offense was committed in this state, and the injured party, at the commencement of the action was an actual inhabitant of this state.

2 R. S., 144, § 38.

Cases in which divorce for adultery is denied.

§ 52. Although the fact of adultery is established, the court may deny a divorce in the following cases:

1. Where the application for divorce was not made within five years after the discovery by the applicant of the offense charged;

2. Where the offense appears to have been committed by the procurement, or with the connivance of the party asking the divorce;

3. Where the offense charged has been forgiven by the injured party, and such forgiveness is proved by express proof, or by the voluntary cohabitation of the parties with knowledge of the fact;

4. Where it appears that the applicant has also been guilty of adultery, under such circumstances as would have entitled the other party, if innocent, to a divorce.

2 R. S., 145, § 42.

Legitimacy of issue.

§ 53. When a divorce is granted for the adultery of the husband, the legitimacy of issue of the marriage begotten of the wife before the commencement of the action is not affected.

When granted for the adultery of the wife, the legitimacy of issue begotten of her before the commission of the offense, is not affected; but the legitimacy of other children of the wife may be determined by the court, upon the proofs in the case. In every such case all issue, begotten before the commencement of the action, are to be presumed legitimate until the contrary is shown.

2 R. S., 145, § 44.

§ 54. When a divorce is granted for adultery, the innocent party may marry again during the life of the defendant; but the guilty party cannot until the death of the other. When remarriage is forbidden.

2 R. S., 146, § 49.

NOTE—Several other provisions of the Revised Statutes, in respect to the effect of the judgment on the rights of property of the parties, are omitted as being superseded by other provisions of this Code.

## ARTICLE III.

### SEPARATIONS.

SECTION 55. When separation may be adjudged.
56. Causes for separation.
57. Relief may be adjudged in some cases where separation is denied.
58. Judgment of separation, when revoked.

§ 55. A separation from bed and board, for life or for a limited time, may be adjudged by any court of competent jurisdiction, in either of the following cases: When separation may be adjudged

1. Between any husband and wife, actual inhabitants of this state;

2. Where the marriage was contracted or solemnized within this state, and the applicant is an actual resident at the time of the application;

3. Where the marriage was celebrated without this state, and the parties have become and remained actual inhabitants of this state at least one year, and the applicant is an actual resident at the time of the application.

2 R. S., 146, § 50. The restriction of this provision to applications by the wife for relief against the husband has been omitted. This is doubtless the just rule, and it probably does not change the existing law; Laws of 1824, ch. 205, § 12. Perry *v.* Perry, 2 *Paige*, 501; 2 *Barb. Ch.*, 311.

§ 56. Such separations may be decreed for the following causes: Causes for separation.

1. Cruel and inhuman treatment of one party by the other;

2. Conduct on the part of one towards the other rendering cohabitation unsafe and improper;

3. Abandonment and refusal to fulfill the obligations of husband or wife prescribed by chapter III of this Code.

2 R. S., 147, § 51. See preceding note.

Relief may be adjudged in some cases where separation is denied.

§ 57. Where judgment of separation is sought, though it be denied, the court may make such order or judgment for the support and maintenance of the wife and her children, or any of them, by the husband or out of his property, as the nature of the case renders suitable and proper.

2 R. S., 147, § 55.

Judgment of separation, when revoked.

§ 58. A judgment for separation, whether for life, or for a limited period, may be at any time revoked, under such regulations as the court may impose, upon the joint application of the parties, and upon their producing satisfactory evidence of their reconciliation.

2 R. S., 147, § 56.

## ARTICLE IV.

### GENERAL PROVISIONS.

SECTION 59. Issues in actions for divorce.
60. Residence of wife.
61. Expense of action.
62. Orders respecting custody of children.
63. Support of wife and children on divorce or separation granted to wife.
62. Security for maintenance and alimony.

Issues in actions for divorce.

§ 59. In an action to annul a marriage or for a dissolution or separation the plaintiff may set up several causes of action[1]; and the defendant may set up, with a denial of such causes of action, demands for a judgment of nullity, dissolution or separation, as affirmative relief.[2]

[1] Code of Procedure, § 157, subdivision 3.

[2] Ib., § 150; § 274, subdivision 3. See note on page 14, above.

Residence of wife.

§ 60. A wife who, at the time of applying for a divorce, under article II or III, resides in this state is to be deemed an inhabitant, although her husband resides elsewhere.

2 R. S., 147, § 57.

§ 61. Pending any action for divorce, the court may, in its discretion, require the husband to pay any sums necessary to enable the wife to carry on or defend the action.

Expense of action.

2 R. S., 148, § 58. This provision is extended to the case of actions to annul a marriage, in accordance with the decision in North *v.* North, 1 *Barb. Ch.*, 241.

§ 62. In any action for a divorce the court may, pending the action or after judgment, as occasion may require, make such order, between the parties, for the custody, care and education of the children of the marriage as may seem necessary and proper, and may at any time modify or vacate the same.

Orders respecting custody of children.

2 R. S., 148, § 59.

§ 63. Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the issue of the marriage, and to provide such suitable allowance to the wife, for her support, as the court deem just, having regard to the circumstances of the parties respectively.

Support of wife and children on divorce or separation granted to wife.

2 R. S., 145, § 45; 147, § 54.

§ 64. The court may require a husband to give reasonable security for providing any maintenance or support, or making any payments required under the provisions of this article, and may enforce the same by the appointment of a receiver and by any provisional remedy applicable to the case.

Security for maintenance and alimony.

2 R. S., 148, § 60. Modified to conform to the practice under the Code of Procedure.

## CHAPTER III.

### HUSBAND AND WIFE.

NOTE.—The provisions of this chapter are intended to complete, so far as seems just and desirable, the removal of the disabilities of married women, and thus to simplify the law of this vexed subject.

SECTION 65. Mutual obligations of husband and wife.
66. Rights of husband as head of the family.
67. Duties of husband to wife as to support.
68. In other respects their interests are separate.
69. Husband and wife may make contracts.

SECTION 70. How far may impair their legal relation.
71. Neither answerable for the acts of the other.
72. Obligations of the husband in case of separation.
73. Abandonment of husband by the wife.
74. Husband's remedy for enticing away his wife.

**Mutual obligations of husband and wife.**

§ 65. Husband and wife contract towards each other obligations of mutual respect, fidelity and support.

**Rights of husband as head of the family.**

§ 66. The husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto.

**Duties of husband to wife as to support.**

§ 67. He must support her out of his property or by his labor. If he is unable to do so she must assist him so far as she is able.

**In other respects their interests are separate.**

§ 68. Except as mentioned in the last two sections, neither husband nor wife has any interest in the property of the other.

**Husband and wife may make contracts.**

§ 69. They may make with each other, and each may make with any other person, any engagement or transaction respecting property which they might make, if unmarried.

**How far may impair their legal relation.**

§ 70. A husband and wife cannot by any contract with each other alter their legal relation, except that they may voluntarily agree to an immediate separation, and may make provision for the support of the wife and children during such separation.

Beach *v.* Beach, 2 *Hill*, 260; 1 *Sharsw. Blacks.*, 441, and note.

**Neither answerable for the acts of the other.**

§ 71. Neither is answerable for the acts of the other, except so far as one acts as the agent of the other.

**Obligations of the husband in case of separation.**

§ 72. If the husband and wife separate by consent, and the husband secures to her a separate maintenance according to their condition and circumstances in life, by a written agreement, he is not answerable for necessaries furnished for her support so long as he performs such agreement.

Calkins *v.* Long, 22 *Barb.*, 97, and cases there cited.

**Abandonment of husband by the wife.**

§ 73. If the wife abandons the husband he is not liable for her support until she offers to return, unless it be shown that she was justified by his misconduct.

Blowers *v.* Sturtevant, 4 *Denio*, 46, and cases there cited.

§ 74. A husband may maintain an action for enticing away his wife or inducing her to live apart from him.

Husband's remedy for enticing away his wife.

Bennett *v.* Smith, 21 *Barb.*, 439, and cases there cited.

## TITLE II.

### PARENT AND CHILD.

SECTION 75. What children presumed legitimate.
76. Who may dispute the legitimacy of a child.
77. Obligation of father and mother for the support and education of their children.
78. Custody of children.
79. Remedy for parental abuse.
80. Effect of the lawful marriage of a minor child.
81. Remedy when a parent dies without providing for the support of his child.
82. Parent cannot control the property of child.
83. Custody and rights of an illegitimate child.
84. Reciprocal duties of parents and children in maintaining each other.
85. When a parent is liable for necessaries supplied to a child.
86. When a parent is not liable for support furnished his child.
87. Husband not bound for the support of his wife's children by a former marriage.
88. Compensation and support of adult child.
89. Action for seduction of a daughter.
90. Parent may relinquish services and custody of child.
91. Wages of minors.
92. Right of parent to determine the residence of child.
93. Wife in certain cases may obtain custody of minor children.
94. Abduction of children forbidden.

§ 75. All children born in wedlock are presumed to be legitimate.

What children presumed legitimate.

§ 76. This presumption can be disputed only by the husband or wife, or the descendant of one or both of them. But illegitimacy, in such case, may be proved like any other fact.

Who may dispute the legitimacy of a child.

§ 77. The father must give his child support and education suitable to his circumstances. If the support and education which he is able to give is inadequate, the wife must assist him to the extent of her ability.

Obligation of father and mother for the support and education of their children.

Custody of children.

§ 78. The father and mother have the joint custody of the person and control of the employment of their unmarried minor legitimate child.

See note to section 21, above.

Remedy for parental abuse.

§ 79. The abuse of parental authority is the subject of judicial cognizance in a civil action by the child or by the supervisor of the town; and when established, the child may be freed from the dominion of the parent, the parent punished, and the duty of support and education enforced.

Effect of the lawful marriage of a minor child.

§ 80. The lawful marriage of a child absolves such child from the parental authority.

Remedy when a parent dies without providing for the support of his child.

§ 81. If a parent dies leaving a child chargeable to the town and an estate sufficient for the support of the child, the supervisor of the town may claim provision for its support from the parent's estate by civil action, and for this purpose may have the same remedies against that estate and the heirs, devisees and next of kin, as any creditor.

Parent cannot control the property of child.

§ 82. The parent, as such, has no control over the property of the child.

Custody and rights of an illegitimate child.

§ 83. The mother of an illegitimate and unmarried minor child is entitled to its custody and services, and the child is entitled to support and education from the mother, and may take from her by succession in case of intestacy.

Reciprocal duties of parents and children in maintaining each other.

§ 84. It is the duty of the father, the mother, and the children, who are of sufficient ability, of any poor person who is disabled from maintaining himself or herself by work, to maintain such child or parent. The promise of an adult child to pay for necessaries furnished to such parent is binding.

NOTE.—The provisions of the Poor Laws declare the duty of parents and children to support each other, 1 R. S., 614, § 1; but it is held that in the case of the duty of children the obligation is purely statutory, and no other remedy exists except that provided by proceedings under those laws.

It is the object of this section to recognize the obligation as a ground of legal liability independent of those provisions.

§ 85. If a parent neglects to provide for his child who is under his control, articles necessary for it according to his situation in life, a third person may in good faith supply such necessaries and recover the expenses thereof from the parent.

When a parent is liable for necessaries supplied to a child.

Van Valkinburgh *v.* Watson, 13 *Johns.*, 480; Chilcott *v.* Trimble, 13 *Barb.*, 502; Clinton *v.* Rowland, 24 *id.*, 634; Henry *v.* Betts, 1 *Hilt.*, 156, and see Raymond *v.* Loyl, 10 *Barb.*, 483.

§ 86. A parent is not bound to compensate a relative who voluntarily supports his child without any agreement for compensation, nor to compensate a stranger who supports a child who has abandoned the parent.

When a parent is not liable for support furnished his child.

Raymond *v.* Loyl, 10 *Barb.*, 483; Clark *v.* Fitch, 2 *Wend.*, 459; Chilcott *v.* Trimble, 13 *Barb.*, 502.

§ 87. A husband is not bound to maintain his wife's children by a former husband,[1] but if he receives them into his family and supports them, it may be presumed, unless the contrary appears, that he does so as if their parent, and they are not liable to him for their support, nor he to them for their services.[2]

Husband not bound for the support of his wife's children by a former marriage.

[1] Gay *v.* Ballou, 4 *Wend.*, 403; Williams *v.* Hutchinson, 5 *Barb.*, 122; Bartley *v.* Richtmyer, 4 *N. Y.* (4 *Comst.*), 38; Elliott *v.* Lewis, 3 *Edw.*, 40.

[2] Sharp *v.* Cropsey, 11 *Barb.*, 224; Williams *v.* Hutchinson, 3 *N. Y.* (3 *Comst.*), 312.

§ 88. Where a child, after attaining majority, continues to serve and to be supported by the parent, in the absence of any agreement for compensation, neither party is entitled to compensation.

Compensation and support of adult child.

Dye *v.* Kerr, 15 *Barb.*, 444, and see Cropsey *v.* Sweeney, 27 *Barb.*, 310; S. C., 7 *Abbott's Pr.*, 129.

§ 89. A father whose daughter has been seduced, may maintain an action for the injury to his wounded honor and parental feelings, whether the daughter was in his service or not.

Action for seduction of a daughter.

This is intended to modify the existing law. See Clark *v.* Fitch, 2 *Wend.*, 459.

A parent relinquishing right to services and custody of child.

§ 90. The parent may relinquish to the child the right of controlling him and receiving his earnings.[1] Abandonment by the parent is presumptive evidence of such release.[2]

[1] McCoy v. Huffman, 8 *Cow.*, 84; Burlingame v. Burlingame, 7 *id.*, 92.

[2] Canovar v. Cooper, 3 *Barb.*, 115.

Wages of minors.

§ 91. Where a minor is employed in service, the parent or guardian must, within thirty days after the commencement of such service, give the employer notice that he claims the wages of such minor; otherwise, payment to the minor is valid.

Laws of 1850, ch. 266, § 1. Same stat. 2 R. S., 5th ed., 242, § 8.

Right of parent to determine the residence of child.

§ 92. A parent has a right to change the residence of his minor children, subject to the power of the supreme court to restrain a removal which would prejudice the rights or welfare of the child.

Wood v. Wood, 5 *Paige*, 596.

Wife in certain cases may obtain custody of minor children.

§ 93. When a husband and wife live in a state of separation without being divorced, the wife, if an inhabitant of this state, may apply to any court or officer of competent jurisdiction for a writ of deliverance from imprisonment to inquire into the custody of any minor unmarried child of such marriage. If any husband or wife attaches him or herself to the society of shakers and detains a child of the marriage, the other party, if a resident of the state, may apply for such writ to inquire into the custody of such child. The proceedings thereupon must be had pursuant to the provisions of chapter V of title II of part III of the Code of Civil Procedure,[1] so far as the same are applicable thereto, and the court or officer may award the discharge and custody of the child to the party applying for the writ, for such time, and under such regulations as the case may require, and at any time thereafter, the court, or the officer or his successor, may annul or modify the same.

2 R. S., 149, §§ 1–6.

[1] The reference is to the Code of Civil Procedure as reported complete.

Abduction of children forbidden.

§ 94. If any member of the society of shakers, or any other person sends or carries, or causes to be sent or car-

ried, any such child out of this state, or secretes such child, or causes such child to be secreted within this state so that such writ cannot be executed, he is guilty of a misdemeanor, and, on conviction, shall be fined not exceeding two hundred dollars, or be imprisoned not more than six months, or both.

2 R. S., 149, § 7. This provision may be transferred to the Penal Code.

## TITLE III.

### MASTER AND SERVANT.

SECTION 95. Who may bind themselves as apprentices.
96. Who to consent to such binding.
97. Consent, how signified.
98. Parent or guardian, when liable for breach of indenture.
99. Pauper children may be bound to service.
100. Special provision as to Indian children.
101. Age of infants to be inserted in indentures.
102. Pecuniary consideration to be inserted.
103. Special agreement to be inserted in certain cases.
104. Certain indentures, where to be deposited.
105. Indentures by foreigners, being minors.
106. How assigned.
107. Indentures, when invalid.
108. County superintendents and overseers to be guardians of servants.
109. Penalty on apprentices absenting themselves from service.
110. No servant or apprentice bound by any restriction as to time and place where he shall work when free.
111. When the executor or administrator of a deceased master may assign a contract of service.

Who may bind themselves as apprentices.

§ 95. Male minors, and unmarried females under the age of eighteen years, with the consent of the persons or officers hereinafter mentioned, may voluntarily and in writing, bind themselves, as fully as if they were of age, to serve as clerks, apprentices or servants in a calling, until majority (except in the case of females who cannot bind themselves further than until the age of eighteen,) or for any shorter time.

2 R. S., 154, § 1.

Who to consent to such binding.

§ 96. Such consent must be given:

1. By the father and mother;

2. If either of them is dead, or lacks capacity to consent, or has abandoned the family, and such fact is certified by a justice of the peace of the town, and indorsed on the indenture, then by the remaining parent alone;

3. If there is no parent of capacity to consent, then by the executors of a deceased parent if they have power under the will to bring up the child to a calling;

4. If there is no such parent or such executor, or if any of them refuse, then by the guardian;

5. If there is no parent of capacity to consent, and no guardian, then by the officers of the poor of the town or county, or any two justices of the peace of the town, or the county judge.

2 R. S., 154, §§ 2, 4. Modified in accordance with section 76, which gives the wife joint guardianship.

Consent, how signified.

§ 97. Such consent must be by a certificate at the end of, or indorsed upon the indentures, and signed by the party.

2 R. S., 154, § 3.

Parent or guardian, when liable for breach of indenture.

§ 98. The parent or guardian is not liable for a breach of the indenture by the apprentice unless the language of the indenture or consent evinces his intention to be bound therefor.

Bull *v.* Follett, 5 *Cow.*, 170.

Pauper children may be bound to service.

§ 99. Any child in a county, town, or city poor-house, or who is chargeable, or whose parents are chargeable, to a county, town, or city poor-house, may be bound to service until attaining twenty-one years, or if a female, until attaining eighteen years, by the officers of the poor of such county, town or city, as effectually as by the child himself with the parents' consent; but such binding, by the officers of a town or city, must be with the consent, in writing, of any two justices of the peace of the town, or of the mayor, recorder and aldermen of the city, or any two of them.

2 R. S., 155, § 6.

§ 100. No child of an Indian woman can be bound, under this title, except in the presence, and with the consent of a justice of the peace; and his certificate of consent must be filed with the clerk of the town where the indenture is executed.

Special provision as to Indian children.

2 R. S., 155, § 7.

§ 101. The age of the infant must be stated in the indentures, and such statement is presumptive evidence of the age; and whenever an officer is called on to execute indentures, or to consent thereto, he must inform himself fully of the infant's age.

Age of infants to be inserted in indentures.

2 R. S., 155, § 8. The statement of the age in the indenture may be contradicted by proof. Drew *v.* Peckwell, 1 *E. D. Smith*, 408; Banks *v.* Metcalfe, 1 *Wheel. Cr. Cas.*, 381; Matter of Brennan, 1 *Sandf.*, 711.

§ 102. If there is any pecuniary consideration on either part, it must be stated in the indentures.

Pecuniary consideration to be inserted.

2 R. S., 155, § 9.

§ 103. The indentures of a child, by officers of the poor, must bind the master to have the child taught to read and write, and to give him, at the expiration of service, a new Bible; and if a male, to have him taught the general rules of arithmetic.

Special agreement to be inserted in certain cases.

2 R. S., 155, § 10.

§ 104. Officers of the poor executing indentures must deposit counterparts thereof in the office of the clerk of the county, town or city of which they are officers.

Certain indentures, where to be deposited.

2 R. S., 155, § 11.

§ 105. An immigrant minor may bind himself to service, until he attains majority, or for a shorter term. Such contract, if made for the purpose of enabling him to pay his passage, may be for the term of one year, although such term extends beyond his majority; but in no case for a longer term. But no such contract binds the servant unless it is freely acknowledged by him on a private examination before some mayor, recorder, or alderman of a city, or some justice of the peace, to have been made by him, and a certificate of such acknowledgment is indorsed upon such contract.

Indentures by foreigners, being minors.

2 R. S., 156, §§ 12, 13.

How assigned.

§ 106. The master, under a contract specified in the last section, may assign such contract, by writing indorsed thereon, executed in the presence of two witnesses, and with the approval of any magistrate mentioned in that section, also indorsed thereon.

2 R. S., 156, § 14.

Indentures, when invalid.

§ 107. No indenture or contract for the service of any apprentice is valid as against the apprentice, unless made as herein before prescribed.

2 R. S., 158, § 26.

County superintendents and overseers to be guardians of servants.

§ 108. The county superintendents of the poor, and the overseers of the poor of cities and towns, are the guardians of every person bound or held in service in their respective cities or towns, to take care that the terms of the contract be fulfilled, and that such person be properly used; and it is their special duty to inquire into the treatment of every such person, and redress any grievance in the manner prescribed by law.

2 R. S., 158, § 27.

Penalty on apprentices absenting themselves from service.

§ 109. If an apprentice, for whose instruction there is no pecuniary compensation, willfully absents himself from service without leave, he may be compelled to serve double the time of such absence, unless he makes satisfaction for the injury; but such additional term of service must not extend more than three years beyond the original term.

2 R. S., 158, § 28.

No servant or apprentice bound by any restriction as to time and place where he shall work when free.

§ 110. No person can accept from any servant or apprentice, an agreement, oath or promise not to exercise his vocation in any place; nor can any person exact from a servant or apprentice, after his term of service has expired, any consideration for exercising his vocation in any place. Any consideration paid upon such agreement or exaction, may be recovered back with interest, and every person accepting such agreement or exacting such consideration, is liable to the servant in a penalty of one hundred dollars.

2 R. S., 160, §§ 39, 40.

§ 111. The executors or administrators of the master of any apprentice bound by officers of the poor, may, with the written consent of the apprentice, acknowledged before a justice of the peace, assign the contract of service; and if the apprentice refuses to consent, the court of sessions may, by order, upon application on fourteen days' notice to the apprentice or his parents or his guardian, if any in the county, sanction such assignment without his consent.

When the executor or administrator of a deceased master may assign a contract of service.

2 R. S., 160, §§ 41, 42.

## TITLE IV.

### GUARDIAN AND WARD.

SECTION 112. Two kinds of guardians.
113. Parents of a legitimate child, joint guardians.
114. Mother of illegitimate child.
115. Power of parent to appoint a guardian by deed or will.
116. No person guardian of estate without appointment.
117. The power of parent superseded by the appointment of a guardian by court.
118. Power of the supreme court to appoint guardians.
119. Rules for determining on the custody of a minor.
120. Powers of guardian.
121. Guardian not discharged by ward coming fourteen.
122. Death of a joint guardian.
123. Duties of guardian of estate.
124. A guardian of the estate under the direction of court.
125. Duties of a guardian of the person of a minor.
126. Discharge from guardianship.

§ 112. There are two kinds of guardians:

Two kinds of guardians.

1. General guardians;
2. Special guardians.

A special guardian is one appointed in the course of a civil proceeding, for the purpose of protecting the rights of a minor in that proceeding. All others are general guardians.

General guardians are guardians either of the person or of the estate, or of both.

§ 113. The father and mother of a legitimate child, who is a minor or incapable of taking care of its person, are

Parents of a legitimate child joint guardian.

joint guardians of its person. In case of their disagreement they must act under direction of the court.

Laws of 1860, ch. 90, § 9. The provision of § 67 above will supersede the rule that the right of a widow as guardian of her children appointed by deed or will of the father, is taken away by her subsequent marriage. Corrigan *v.* Kiernan, 1 *Bradf.*, 208.

Mother of illegitimate child.

§ 114. The mother of an illegitimate child who is a minor, or incapable of taking care of its person, is the sole guardian of its person.

Matter of Doyle, *Clarke*, 154; 2 *Kent's Com.*, 178; 2 *Johns.*, 375; 15 *id.*, 208; 15 *Barb.*, 247.

Power of parent to appoint a guardian by deed or will.

§ 115. A surviving parent (or in case of an illegitimate, the mother) of a child likely to be born, or of an unmarried child who is a minor, or incapable of taking care of its person may, by deed or will, appoint a guardian of the person.

Modified from 2 R. S., 150, § 1.

No person guardian of estate without appointment.

§ 116. No person, whether a parent or otherwise, has any power as guardian of the estate, except by appointment as hereinafter provided.

By the existing law (1 R. S., 718, § 5), if any infant has real property and has no father or mother, the nearest and eldest relative, males being preferred to females of the same degree, are declared the guardian of such child, and of such real property.

When a parent dies in possession of real property leaving an infant heir thereof, and his guardian by nature enters thereon, the entry is presumed to be as guardian unless accompanied by acts or declarations inconsistent with such character. Byrne *v.* Van Hoesen, 5 *John.*, 66; Jackson *v.* DeWalts, 7 *id.*, 157; Putnam *v.* Ritchie, 6 *Paige*, 390; Beecher *v.* Crouse, 10 *Wend.*, 306.

The power of parent superseded by the appointment of a guardian by court.

§ 117. The power of the parent, as guardian of the person, is superseded when a guardian of the person is appointed by the court. A guardian, whether of the person or of the estate, appointed by a court, can be superseded only by the court.

It has been held that a guardian of the children of a convict, appointed during his civil death, is superseded by his pardon (10 *Johns.*, 232, 483), but it seems proper that the guardian should be superseded only by order of the court that appointed him.

§ 118. A guardian of the person or estate, or both, of a minor, or of any other person who is incapable of managing his affairs, such ward being resident within this state, may be appointed in all cases by the supreme court, and by a surrogate in the cases provided in the CODE OF CIVIL PROCEDURE. In the case of a non-resident minor, or other such person, having property within the state, a guardian of the estate may be appointed. In all cases, the court first making the appointment has exclusive jurisdiction.[1]

Power of the supreme court to appoint guardians.

Guardians of the persons and estates of insane persons may be appointed in the manner prescribed by the Code of Civil Procedure.

§ 119. In awarding the custody of a minor, or in choosing a general guardian, the court or officer is to be guided by the following considerations:

Rules for determining on the custody of a minor.

1. First and chiefly, by what appears for the best interest of the child in respect both to its temporary and its mental and moral welfare. And if the child is of a sufficient age to form an intelligent preference, the court may consider that preference in determining the question;[2]

2. As between parents adversely claiming the custody or guardianship, neither parent is entitled as of right, but, other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor or business, then to the father;

3. Of two persons equally eligible in other respects, one who is a relative is to be preferred to a stranger.[3] One who was indicated by the wishes of a deceased parent is to be preferred to others.[4] One who already stands in position of a trustee of a fund to be applied to the child's support, is to be preferred to others.[5]

The above section is new.

[1] This provision is new.
[2] Foster v. Mott, 1 *Bradf.*, 409.
[3] Morehouse v. Cooke, *Hopk.*, 226.
[4] Underhill v. Dennis, 9 *Paige*, 402.
[5] Bennett v. Byrne, 2 *Barb. Ch.*, 216.

Powers of guardian.

§ 120. A guardian appointed by the court has power over the person and the estate, except where it is otherwise ordered.

Guardian not discharged by ward coming 14.

§ 121. A person appointed, by the court, guardian of a minor, continues as such until another is appointed, or he is discharged, according to law.

2 R. S., 151, § 10

Death of a joint guardian.

§ 122. On the death of one or two joint guardians, the power continues to the survivor, until a further aopointment is made by the court.

People *a.* Byron, 3 *Johns. Cases*, 53.

Duties of guardian of estate.

§ 123. It is the duty of the guardian of the estate to keep safely the property of his ward and not to suffer any waste, sale or destruction of the real property, but to maintain the inheritance, its buildings and appurtenances out of the moneys of the estate, and to deliver the same to the ward at his majority, in as good condition as the guardian received them, inevitable decay and injury only excepted, under penalty of forfeiting to the ward treble damages.

2 R. S., 153, § 20.

A guardian of the estate under the direction of court.

§ 124. In the management and disposition of the estate committed to him, the guardian may be regulated and controlled by the court.

This section is new. It is intended to qualify the common law rules which empower him to dispose of personalty in his discretion, and of the realty during the term of his guardianship.

Duties of a guardian of the person of a minor.

§ 125. A guardian of the person is charged with the custody of the minor, and must look to his support, health and education,[1] and must not change the residence of the minor to a place without the state, but may, in his discretion, fix the place of residence within the state.

[1] Ex parte Bartlett, 4 *Bradf.*, 221.

Discharge from guardianship.

§ 126. After a ward has come of age he may settle with his guardian and release him, and the release is valid if obtained fairly and without undue influence; but the guardian, if appointed by the court, is not entitled to his discharge until one year after the ward's majority, in order that the ward may have time to investigate the accounts.

# DIVISION SECOND.

## PROPERTY.

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PART I. Property in General.
II. Property in Things Real, or Immovable.
III. Property in Things Personal, or Movable
IV. Acquisition of Property.

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## PART I.

### OF PROPERTY IN GENERAL; THE THINGS IN WHICH IT MAY EXIST; AND THE MODIFICATIONS THEREOF.

TITLE I. Subjects of Property.
II. Distinction of Property.
III. Owners.
IV. Enjoyment of Property.

The following memorandum will show where the provisions of the Revised Statutes relating to property are inserted in this Division.

Sections 1, 3, and 4 of article 1st, in the 2d part of the Revised Statutes, have been, in substance, embodied in the Constitution, and are therefore omitted here. Section 2 is embodied in the title on Succession. Sections 5–7 are superseded by title 4 of part III of Division I.

The provisions of article 2 of the same statute, entitled "Of the persons capable of holding and conveying land," are thus disposed of; — section 8 is extended to the case of *all* persons, and the provisions of the subsequent sections, and other statutes, extending the right of aliens, are omitted. This is in accordance with the recommendation of the governor, in his message of January, 1862.

The capacity of Indians is fixed by section 22 of Part I of Division I, on Persons, and reference to them is omitted in this part of the Code. Section 9 (like other saving clauses

elsewhere) is omitted as being sufficiently provided for by the general clause of the provision at the end of the Code, saving vested rights; and section 10 is omitted as provided for in Part I on PERSONS.

Article 1 of title 2 of the same part of the Revised Statutes, entitled "Of the Creation and Division of Estates," is embodied in title 2 of part II, *infra*, excepting section 39, which, to avoid unnecessary repetition of the same, under a subsequent article relating to personal property, is inserted as section 143.

Article 2 of that title, entitled "Of Uses and Trusts," is embodied in title 4 of part II, *infra*.

Article 3, entitled "Of Powers," is embodied in title 5 of the same.

Article 4, "Of Alienation by Deed," is embodied in the title on Transfers.

Title 3 (p. 740), "Of Dower," is omitted, it being proposed to abolish Dower and Curtesy.

The provisions of title 4 (p. 744) are inserted in title 3 of part II, *infra*, except sections 1, 2, 3, and 26, which are in the chapter on The Hiring of Lands, and sections 4–6, which are to be inserted in the Code of Civil Procedure.

The provisions of title 5 (p. 748) are disposed as follows:

Section 1 is inserted in the chapter on Transfers, and on Wills.

Section 2 is stated in the Division relating to Obligations, as a general principle of interpretation.

Section 3, with important modifications, is embodied in the title on Succession.

Sections 4 and 5 are inserted in the chapter on Mortgages.

Section 6 is embodied in the Code of Civil Procedure, as reported complete, p. 750.

Sections 7–9, are embodied in title 3 of part II, *infra*.

Chapter 2 (p. 751), of Descent, is superseded by the chapter on Succession.

Chapter 3 (p. 756) is embodied in the article on Recording Transfers.

# TITLE I.

## SUBJECTS OF PROPERTY.

SECTION 127. Property defined.
128. Subjects of Property.

Property defined.

§ 127. Property in a thing is the right of one or more persons to use it to the exclusion of others. And, by a figure of speech, the thing, in which the property exists, is itself also called property.

§ 128. Property may exist in all inanimate things which are capable of manual delivery, or appropriation; in all domestic animals; in all obligations; in such products of labor or skill, as the composition of an author, the good-will of a business, trade-marks and signs, and in rights created or granted by statute. Subjects of property.

Animals wild by nature are not the subjects of property while living, unless on the land of the proprietor, or tamed, or taken and held in possession, or disabled and immediately pursued.

## TITLE II.

### DISTINCTION OF PROPERTY.

§ 129. Property is of two kinds: Real and personal.

1. Real or immovable;
2. Personal or movable;

Which are defined by the parts of this Code on REAL PROPERTY and PERSONAL PROPERTY.

## TITLE III.

### OWNERS.

SECTION 130. Owners.
131. Property of the state.
132. Who may own property.

§ 130. All property has an owner, whether that owner be the state, and the property public, or the owner an individual, and the property private. The state may also hold property as a private proprietor. Owners.

§ 131. The state is the owner of all land, below high water mark, bordering upon tide-water; of all property lawfully appropriated by it to its own use; of all property dedicated to the state, and of all property of which there is no other owner. Property of the state.

The ultimate right of the state to all other property is declared by chapter 2 of title II of part III of the POLITICAL CODE. (§§ 249, 250.)

Who may own property.

§ 132. Any person, whether a citizen or not, may take and hold property,[1] real or personal.

The power of a corporation to take or hold property depends solely on the statute which confers it.

[1] Substituted for 2 R. S., 57, § 4. See note on page 35.

# TITLE IV.

## ENJOYMENT OF PROPERTY.

SECTION 133. Increase of property.
134. Qualifications as to time or degree of enjoyment.
135. Absolute property.
136. Qualified property.
137. Fixing the time of enjoyment.
138. Conditions.
139. Certain conditions precedent, void.
140. Conditions restraining marriage, void.
141. Conditions restraining alienation, void.
142. Restriction on qualification of enjoyment.
143. Application of profits, &c., to support, &c., of infants.

Increase of property.

§ 133. Property in a thing confers not only the right to the thing itself but to all its products and accessions, according to the rules hereinafter prescribed in the chapter on Accessions.

This and the nine following sections are new.

Qualifications as to time or degree of enjoyment.

§ 134. Property in a thing may be without qualification, or it may be qualified in respect to the time or manner of enjoyment.

Absolute property.

§ 135. If the property in the thing is without qualification, the owner has the absolute dominion over it, and may use it or dispose of it according to his will, subject to the laws, and his obligations to others.

Qualified property.

§ 136. The qualification of enjoyment may relate to the time when it shall begin or end, or the extent of the use which may be made of the thing; and such qualification may be attached to any thing transferred.

Fixing the time of enjoyment.

§ 137. The time when the enjoyment shall begin or end may be determined by computation, or be made to depend

on events. In the latter case, the enjoyment is said to be upon condition.

§ 138. Conditions are precedent or subsequent. The former fix the beginning, the latter the ending of the right. **Conditions.**

§ 139. If a condition precedent requires the performance of an act wrong of itself, the instrument containing it is so far void, and the right cannot exist. If it requires the performance of an act not wrong of itself, but otherwise illegal, the instrument takes effect and the condition is void. **Certain conditions precedent, void.**

§ 140. Conditions imposing restraints upon marriage, except upon the marriage of widows and of minors, are void; but this does not affect limitations where the intent was, not to forbid marriage, but only to give the use until marriage. **Conditions restraining marriage, void.**

§ 141. Conditions restraining alienation, when repugnant to an estate, are void. **Conditions restraining alienation, void.**

§ 142. Restrictions upon the power to affix qualifications to the right of enjoyment are contained in sections 14 and 15 of article 1 of the Constitution; and in the provisions of this Code, respecting real property and personal property. **Restriction on qualification of enjoyment.**

§ 143. When infants, for whose benefit an accumulation has been directed, in the cases specified in sections 195 and 306, are destitute of other sufficient means of support and education, the court, upon application, may direct a suitable sum to be applied thereto. **Application of profits, &c., to support, &c., of infants.**

1 R. S., 726, § 39.

# PART II.

## PROPERTY IN THINGS REAL, OR IMMOVABLE.

TITLE I. Real Property in General.
II. Creation and Division of Estates.
III. Rights and Liabilities of Tenants.
IV. Uses and Trusts.
V. Powers.

# TITLE I.

## REAL PROPERTY IN GENERAL.

CHAPTER I. The Subjects of Real Property.
II. Boundaries.
III. Application to Real Property, of Rules respecting Personal Property.

# CHAPTER I.

## THE SUBJECTS OF REAL PROPERTY.

SECTION 144. Real property.
145. Land.
146. Water.
147. Fixtures.
148. Appurtenances.
149. Servitudes attached to land.
150. Servitudes not attached to land.
151. Extent of servitudes.
152. Designation of estates; apportioning easements.
153. Rights of owner.

§ 144. Real or immovable property consists of: Real property.

1. Land;
2. That which is affixed to land;
3. That which is incidental or appurtenant to land.

Land.

§ 145. Land is the solid material of the earth, whatever be the ingredients of which it is composed, whether soil, rock, or other substance.

Water.

§ 146. Property in land imports property in water standing thereon. Water running over land belongs to the owner of the land, only so long as it remains there. He cannot prevent its natural flow or pursue it.

Fixtures.

§ 147. A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines or shrubs; or imbedded in it, as in case of walls; or permanently resting upon it, as in case of buildings; or attached to what is thus permanent, as by means of nails, bolts or screws.

Appurtenances.

§ 148. A thing is deemed to be incidental or appurtenant to land, when it is by right used with the land; as in case of a right of way, or watercourse, or of light, air or heat from or across the land of another.

Servitudes attached to land.

§ 149. The following burdens or servitudes upon the land of another may be attached to land as incidents or appurtenances, and are then called easements:

1. The right of pasture on other land;
2. The right of fishing in other waters;
3. The right of taking game on other land;
4. The right of way over other land;
5. The right of taking wood, minerals and other things from the land of another;
6. The right of receiving air, light or heat from or over the land of another;
7. The right of receiving or discharging water over other land.

Servitudes not attached to land.

§ 150. The following land burdens, or servitudes upon the land of another, may be granted and held, though not attached to land:

1. The right of fishing and taking game;
2. The right to a seat in a church;
3. The right of burial;
4. The right of taking rents and tolls.

§ 151. The extent of these servitudes is determined by the terms of the grant, or the nature of the possession by which they were acquired. **Extent of servitudes.**

§ 152. The land to which the easement is attached is called the dominant estate; the land upon which the burden or servitude is laid is called the servient estate. In cases of partition of the dominant estate, the burdens must be apportioned, according to the division of the dominant estate, but not in such a way as to increase the burden upon the servient estate. **Designation of estates.** **Apportioning easements.**

The latter clause is added to meet the objection that common of estovers cannot be apportioned because so doing would multiply the burden. Livingston *a.* Ketcham, 1 *Barb.*, 592.

§ 153. The owner of land in fee has the right to the surface and to everything beneath or above it; and may use the same in any manner he pleases, doing no injury to the property or person of another. **Rights of owner.**

## CHAPTER II.

### BOUNDARIES.

SECTION 154. Boundaries by water.
155. Boundaries by ways.
156. Monuments.
157. Fences.
158. Lateral support.

§ 154. When land borders upon tide-water, the owner of the upland takes to high-water mark; when it borders upon a navigable lake where there is no tide, the owner takes to the edge of the lake; when it borders upon a lake not navigable, or a stream where there is no tide, the owner takes to the centre of the lake or stream. **Boundaries by water.**

§ 155. An owner of land, bounding on a road or street, except in the city of New York, is presumed to own to the centre of the way, but the contrary may be shown. **Boundaries by ways.**

§ 156. Coterminous owners are bound equally to maintain the boundaries and monuments between them. **Monuments**

Fences.

§ 157. They are also bound equally to maintain fences; unless one of them chooses to let his land lie open, in which case, if he afterwards incloses it, he must refund to the other a just proportion of the value at that time, of any division fence made by the latter.

1 R. S., 353, § 31. The mode of determining controversies as to fences is prescribed by the POLITICAL CODE.

Lateral support.

§ 158. Coterminous owners are each entitled to the lateral support which his land by nature receives from the land of the other.

## CHAPTER III.

### APPLICATION TO REAL PROPERTY, OF RULES RESPECTING PERSONAL PROPERTY.

§ 159. Except as otherwise provided in this CODE, real property is subject to the same rules as personal property.

# TITLE II.

## CREATION AND DIVISION OF ESTATES.

The provisions of this title are from 1 R. S., 722.

SECTION 160. Enumeration of estates.
161. What estate a fee simple.
162. Estates tail abolished; their nature declared.
163. Certain remainders valid.
164. Freeholds; chattels real; chattel interests.
165. Estates for life of a third person, when freehold, &c.
166. In possession or expectancy.
167. Definitions of those estates.
168. Enumeration of estates in expectancy.
169. Future estates.
170. When they are remainders.
171. Reversions.
172. Vested and contingent future estates.
173. Future estates void, which suspend power of alienation.
174. How long it may be suspended.
175. Contingent remainder in fee.
176. Limitation of successive estates for life.
177. Remainder upon certain estates for life.

SECTION 178. When remainder to take effect in certain cases.
179. Contingent remainder on a term of years.
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192. Remainders not to be defeated in certain cases.
193. Qualities of expectant estates.
194. Future profits of real property.
195. Accumulation of profits of real property.
196. Other directions, when void wholly or in part.
197. In certain cases who entitled to profits of real property.
198. Expectant estates, when deemed created.
199. Certain expectant estates abolished.
200. Estates in severalty, joint tenancy, and in common.
201. What to be in common; what in joint tenancy.

Enumeration of estates.

§ 160. Estates in real property are divided into estates of inheritance, estates for life, estates for years, and estates at will.

The term "estates by sufferance" has been omitted, as it is proposed to designate all such as estates at will.

What estate a fee simple.

§ 161. Every estate of inheritance, notwithstanding the abolition of tenures, continues to be called a fee simple, or fee; and every such estate, when not defeasible or conditional, is called a fee simple absolute, or an absolute fee.

Estates tail abolished; their nature declared.

§ 162. Estates tail are abolished; and every estate which would be adjudged a fee tail, according to the law of this state, as it existed previous to the twelfth day of July, one thousand seven hundred and eighty-two, is a fee simple; and if no valid remainder is limited thereon, is a fee simple absolute.

Certain remainders valid.

§ 163. Where a remainder in fee is limited upon any estate, which would by that law be adjudged a fee tail, such remainder is valid as a contingent limitation upon a fee, and vests in possession, on the death of the first taker, without issue living at the time of such death.

Freeholds; chattels real; chattel interests.

§ 164. Estates of inheritance and for life, are called estates of freehold: estates for years are chattels real: and estates at will are chattel interests, but are not liable as such to sale on execution.

Estates for life of a third person, when a freehold, &c.

§ 165. An estate during the life of a third person, whether limited to heirs or otherwise, is a freehold only during the life of the grantee or devisee. After his death it is a chattel real.

In possession or expectancy.

§ 166. Estates, as respects the time of their enjoyment, are divided into estates in possession, and estates in expectancy.

Definitions of those estates.

§ 167. An estate in possession exists, when the owner has an immediate right to the possession of the land. An estate in expectancy exists when the right to the possession is postponed to a future period.

Enumeration of estates in expectancy.

§ 168. Estates in expectancy are divided into:

1. Estates commencing at a future day, denominated future estates; and,

2. Reversions.

Future estates.

§ 169. A future estate is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time, or otherwise, of a precedent estate, created at the same time.

When they are remainders.

§ 170. Where a future estate is dependent on a precedent estate, it may be called a remainder, and may be created and transferred by that name.

Reversions.

§ 171. A reversion is the residue of an estate left in the grantor, or his successors, or in the successors of a testator, commencing in possession on the determination of a particular estate granted or devised.

Vested and contingent future estates.

§ 172. Future estates are either vested or contingent. They are vested, when there is a person in being, who would have an immediate right to the possession of the property, upon the ceasing of the intermediate or precedent estate. They are contingent, whilst the person to

whom, or the event upon which, they are limited to take effect, remains uncertain.

Future estates void, which suspend power of alienation.

§ 173. Every future estate is void in its creation which suspends the absolute power of alienation for a longer period than is prescribed in this title. Such power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed.

How long it may be suspended.

§ 174. The absolute power of alienation cannot be suspended, by any limitation, or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate, except in the single case mentioned in the next section.

Contingent remainder in fee.

§ 175. A contingent remainder in fee may be created on a prior remainder in fee, to take effect on the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined, before they attain their full age.

Limitation of successive estates for life.

§ 176. Successive estates for life cannot be limited except to persons in being at the creation thereof; and where a remainder is limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto are void, and upon the death of those persons the remainder takes effect in the same manner as if no other life estates had been created.

Remainder upon certain estates for life.

§ 177. No remainder can be created upon an estate for the life of any other person than the grantee or devisee of such estate, unless such remainder is in fee; nor can a remainder be created upon such an estate in a term for years, unless it is for the whole residue of such term.

When remainder to take effect in certain cases.

§ 178. When a remainder is created upon any such life estate, and more than two persons are named as the persons during whose lives the life estate shall continue, the remainder takes effect upon the death of the two persons first named, in the same manner as if no other lives had been introduced.

Contingent remainder on a term of years.

§ 179. A contingent remainder cannot be created on a term of years, unless the nature of the contingency on which it is limited is such, that the remainder must vest in interest during the continuance of not more than two lives in being at the creation of such remainder, or upon the termination thereof.

Remainder of estates for life.

§ 180. No estate for life can be limited as a remainder on a term of years, except to a person in being at the creation of such estate.

Meaning of "heirs" and "issue" in certain remainders.

§ 181. Where a remainder is limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, or in equivalent words, such words must be construed to mean successors or issue living at the death of the person named as ancestor.

Limitations on chattels real.

§ 182. The provisions of this title relative to future estates, apply to limitations of chattels real, as well as of freehold estates, so that the absolute ownership of a term of years cannot be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee.

Remainders, future and contingent estates, how created.

§ 183. Subject to the preceding rules of this title, a freehold estate, as well as a chattel real, may be created to commence at a future day; an estate for life may be created in a term of years, and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created, expectant on the determination of a term of years; and a fee may be limited on a fee, upon a contingency, which if it should occur, must happen within the period prescribed in this title.

Two or more future estates

§ 184. Two or more future estates may also be created to take effect in the alternative, so that if the first in order fails to vest, the next in succession shall be substituted for it, and take effect accordingly.

Certain future estates not to be void.

§ 185. A future estate is not void merely on the ground of the probability or improbability of the contingency on which it is limited to take effect.

§ 186. A remainder may be limited on a contingency which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder is to be deemed a conditional limitation. Remainder upon a contingency.

§ 187. Where a remainder is limited to the heirs, or heirs of the body, or in equivalent words, of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the successors or heirs of the body of such tenant for life, are entitled to take as purchasers by virtue of the remainder so limited to them. Heirs of a tenant for life, when to take as purchasers.

§ 188. When a remainder, on an estate for life or for years, is not limited on a contingency defeating or avoiding such precedent estate, it must be construed as intended to take effect only on the death of the first taker, or the expiration, by lapse of time, of such term of years. Construction of certain remainders.

§ 189. When a future estate is limited to successors, heirs, issue or children, posthumous children are entitled to take, in the same manner as if living at the death of their parent. Posthumous children.

§ 190. A future estate depending on the contingency of the death of any person without successors, heirs, issue, or children, is defeated by the birth of a posthumous child of such person, capable of taking by succession. Id.

§ 191. No expectant estate can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent estate, nor by any destruction of such precedent estate by disseizin, forfeiture, surrender, merger or otherwise. Expectant estates not to be defeated, &c.

This section does not prevent an expectant estate from being defeated in any manner, or by any act or means, which the party creating such estate, in the creation thereof provided for or authorized; nor is an expectant estate thus liable to be defeated, to be on that ground adjudged void in its creation.

§ 192. No remainder, valid in its creation, is defeated by the determination of the precedent estate before the happening of the contingency on which the remainder is limited to take effect; but should such contingency after- Remainders not to be defeated in certain cases.

wards happen, the remainder takes effect in the same manner and to the same extent as if the precedent estate had continued to the same period.

Qualities of expectant estates.

§ 193. Expectant estates pass by succession, devise and transfer in the same manner as estates in possession.

Future profits of real property.

§ 194. Dispositions of the rents and profits of real property to accrue and be received at any time subsequent to the execution of the instrument creating such disposition, are governed by the rules of this title in relation to future estates.

Accumulation of profits of real property.

§ 195. An accumulation of rents and profits of real property, for the benefit of one or more persons, may be directed by any will or grant, sufficient to pass real property, as follows:

1. If such accumulation is directed to commence on the creation of the estate out of which the rents and profits are to arise, it must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority;

2. If such accumulation is directed to commence at any time subsequent to the creation of the estate out of which the rents and profits are to arise, it must commence within the time in this title permitted for the vesting of future estates, and during the minority of the persons for whose benefit it is directed, and terminate at the expiration of such minority.

Other directions, when void in part.

§ 196. If in either of the cases mentioned in the last section, the direction for such accumulation is for a longer term than during the minority of the persons intended to be benefited thereby, it is void as respects the time beyond such minority. And all directions for the accumulation of the rents and profits of real property, except such as are herein allowed, are void.

When wholly void.

In certain cases who entitled to profits of real property.

§ 197. When in consequence of a valid limitation of an expectant estate, there is a suspense of the power of alienation or of the ownership, during the continuation of which the rents and profits are undisposed of, and no valid direc-

tion for their accumulation is given, such rents and profits belong to the persons presumptively entitled to the next eventual estate.

Expectant estates, when deemed created.

§ 198. The delivery of the grant, where an expectant estate is created by grant, and the death of the testator, where it is created by devise, is to be deemed the time of the creation of the estate.

Certain expectant estates abolished.

§ 199. Expectant estates, except such as are enumerated and defined in this title, are abolished.

Estates in severalty, joint tenancy and in common.

§ 200. Estates in respect to the number and connection of their owners, are either in severalty, in joint tenancy, or in common:

1. An estate in severalty is one which is held by the tenant in his own right only, without any other being connected with him in point of interest, during the continuance of his estate;

2. An estate in joint tenancy is one which is held by several tenants, by a joint title created expressly by one and the same transfer or will, and in equal shares;

3. An estate in common is one which is held by several tenants, by distinct titles, but by unity of possession.

Substituted for 1 R. S., 726, § 43.

What to be in common; what in joint-tenancy.

§ 201. Every estate granted or devised to two or more persons, in their own right, is a tenancy in common, unless expressly declared to be in joint tenancy; but every estate vested in executors or trustees, as such, is to be held by them in joint tenancy.

# TITLE III.

## RIGHTS AND LIABILITIES OF TENANTS.

SECTION 202. Rights of tenant for life.
203, 204. Rights of tenants for years, &c.
205. Tenancy at will may be terminated by notice.
206. How served.
207. Tenant must yield possession after giving notice.
208. Liability of tenants, &c., holding over after notice to quit.
209. Liability of guardians, &c., holding over after their estates have ceased.
210. Reëntry, when and how to be made.
211. Rights of grantees of rents and reversion.
212. Rights of lessees and their assignees, &c.
213. Remedy on leases for life.
214. Rent dependent on life.
215. Tenant must deliver notice served on him.
216. Remedies of reversioners, &c.

**Rights of tenant for life.**

§ 202. The owner of a life-estate may use the land in the same manner as the owner of a fee simple, except that he must keep the buildings and fences in repair, from ordinary waste, pay the taxes and other annual charges, and do no act to the injury of the inheritance.

**Rights of tenant for years, &c.**

§ 203. The rights which belong to the owner of a less estate depend upon the terms of the instrument by which it is created, except as herein provided.

**Id.**

§ 204. A tenant for years or at will, unless he is a wrong-doer by holding over, may occupy the buildings and take the annual products of the soil, and may harvest the crops growing at the end of his tenancy. But he has no other rights unless they are given by the instrument by which his tenancy is acquired.

**Tenancy at will may be terminated by notice.**

§ 205. A tenancy at will, however created, may be terminated by the landlord's giving one month's notice in writing to the tenant, requiring him to remove therefrom; and at the expiration of the month the landlord may re-

enter, or proceed according to law to regain possession, without further notice.

1 R. S., 745, §§ 7, 9.

How served

§ 206. Such notice shall be served by delivering the same to such tenant, or to some person of proper age residing on the property; or if the tenant cannot be found, and there is no such person residing on the property, the notice may be served by affixing the same on a conspicuous part of the premises, where it may be conveniently read.

1 R. S., 745, § 8.

Tenant must yield possession after giving notice.

§ 207. If any tenant gives notice of his intention to quit the premises held by him, and does not accordingly deliver up the possession thereof, at the time in such notice specified, he and his personal representatives must thenceforth and during all the time of continuing in possession, pay double the rent which he should otherwise have paid.

1 R. S., 745, § 10.

Liability of tenants, &c., holding over after notice to quit.

§ 208. If any tenant for life or years, or other person having possession under or by collusion with such tenant, willfully holds over any real property after the termination of such term, and after demand made, and one month's notice to quit, according to section 206, he must pay to the person so kept out of possession, or his personal representatives, at the rate of double the yearly value of the property, as long as he withholds possession, together with damages.

1 R. S., 745, § 11.

Liability of guardians, &c., holding over after their estates have ceased

§ 209. Every person who, as guardian or trustee for an infant, and every other person having an estate determinable upon any life or lives, who, after the determination of such particular estate, without the express consent of the party immediately entitled after such determination, holds over and continues in possession of any real property is a trespasser; and every person entitled to such property upon the determination of such particular estate, may recover from him, in damages, the value of the profits received during such wrongful possession.

1 R. S., 749, § 7.

Re-entry, when and how to be made.

§ 210. Whenever the right of re-entry is given to a grantor or lessor in any grant or lease, in default of sufficient distress for rent, such re-entry may be made at any time after default in the payment of the rent, upon fifteen days' previous written notice of intention to re-enter, served in the mode prescribed by section 206.

Laws of 1846, ch. 274, § 3; same stat. 3 R. S., 5 ed., 36, § 12.

Rights of grantees of rents and reversion.

§ 211. Persons to whom any real property is transferred, upon which rents have been reserved, whether upon a lease in fee or otherwise, or to whom any such rents are transferred, are entitled to the same remedies for non-performance of the terms of the lease, or for recovery of rent, or for any waste or cause of forfeiture, as their grantor might have had.

1 R. S., 747, § 23.

Rights of lessees and their assignees, &c.

§ 212. The lessees of any real property, whether in fee or otherwise, and their assigns, have the same remedies against the lessor, and his grantees or assignees, for the breach of any agreement in such lease, as such lessee might have had against his immediate lessor, except covenants against incumbrances or relating to the title or possession of the premises.

1 R. S., 747, § 24.

Remedy on leases for life.

§ 213. Rent due upon a lease for life may be recovered in the same manner as upon a lease for years.

1 R. S., 747, § 19.

Rent dependent on life.

§ 214. Rent dependent on the life of a person may be recovered after, as well as before, his death.

1 R. S., 747, § 20.

Tenant must deliver notice served on him.

§ 215. Every tenant who receives notice of any proceeding to recover the real property occupied by him, or the possession thereof, must immediately inform his landlord thereof, under penalty of forfeiting to him the value of three years' rent of the premises so occupied.

1 R. S., 748, § 27.

Remedies of reversioners, &c.

§ 216. A person having an estate in remainder or reversion, may maintain an action for any injury done to the

inheritance, notwithstanding an intervening estate for life or years.

1 R. S., 750, § 8.

# TITLE IV.

## USES AND TRUSTS.

The provisions of this title are from 1 R. S., 727.

SECTION 217. Certain uses and trusts abolished.
218. Executed uses existing.
219. Right to possession of lands creates legal ownership.
220. Trustees of estate for use of another take no interest.
221. Preceding sections qualified.
222. Transfer to one for money paid by another.
223. Rights of creditors.
224. Section 222 qualified.
225. Purchasers protected.
226. For what purposes express trusts may be created.
227. Certain devises in trust to be deemed powers.
228. Profits of land liable to creditors in certain cases.
229. Other express trusts to be powers in trust.
230. And land, &c., to descend to persons entitled.
231. Trustees of express trusts to have whole estate.
232. Interests remaining in grantor of express trust.
233. Powers over trust of party interested.
234. Effect of omitting trust in conveyance.
235. Certain sales, &c., by trustees, void.
236. Property may be granted to literary institutions in trust.
237. To cities and villages.
238. For use of common schools.
239. Special laws.
240. When estate of trustee to cease.

**Certain uses and trusts abolished.**

§ 217. Uses and trusts, in respect to real property, are abolished, except as provided in this title.

**Executed uses existing.**

§ 218. Every estate which is now held as a use, executed under any former statute of this state, is confirmed as a legal estate.

**Right to possession of lands creates legal ownership.**

§ 219. Every person, who, by virtue of any grant, assignment or devise is entitled to the actual possession of real property, and the receipt of the rents and profits thereof, is to be deemed to have a legal estate therein, of

the same quality and duration, and subject to the same conditions as his beneficial interest.

This section does not divest the estate of any trustees in a trust existing on the first day of January, one thousand eight hundred and thirty, where the title of such trustees is not merely nominal, but is connected with some power of actual disposition or management in relation to the real property which is the subject of the trust.

Trustees of estate for use of another take no interest.

§ 220. Every disposition of real property, whether by transfer or will, must be directly to the person in whom the right to the possession and profits is intended to be vested, and not to any other, to the use of or in trust for such person; and if made to one or more persons, to the use of or in trust for another, no estate or interest vests in the trustee.

Preceding sections qualified.

§ 221. The preceding sections in this title do not extend to trusts arising or resulting by implication of law, nor prevent or affect the creation of such express trusts as are hereinafter authorized and defined.

Transfer to one for money paid by another.

§ 222. Where a transfer for a valuable consideration is made to one person, and the consideration therefor is paid by another, no use or trust results in favor of the person by whom such payment is made; but the title vests in the grantee, subject only to the provisions of the next section.

Rights of creditors.

§ 223. Every such transfer is presumptively fraudulent as against the creditors, at that time, of the person paying the consideration; and where a fraudulent intent is not disproved, a trust results in favor of such creditors, to the extent necessary to satisfy their just demands.

Section 222 qualified.

§ 224. Section 222, does not apply to cases where the grantee took the grant as an absolute transfer in his own name, without the consent or knowledge of the person paying the consideration, or where such grantee, in violation of some trust, purchased the real property so transferred, with moneys belonging to another person.

Purchasers protected.

§ 225. No implied or resulting trust can prejudice the title of a purchaser, for a valuable consideration, without notice of such a trust.

§ 226. Express trusts may be created for any of the following purposes:

For what purposes express trusts may be created.

1. To sell real property for the benefit of creditors;

2. To sell, mortgage or lease real property for the benefit of legatees or for the purpose of satisfying any charge thereon;

3. To receive the rents and profits of real property, and apply them to the use of any person, during the life of such person, or for any shorter term, subject to the rules of title II of this Part of the Civil Code.

4. To receive the rents and profits of real property and to accumulate the same, for the purposes and within the limits prescribed by the same title.

§ 227. A devise of real property to executors or other trustees, to be sold or mortgaged, when the trustees are not also empowered to receive the rents and profits, vests no estate in the trustees; but the trust is valid as a power, and the property passes to the devisees of the will, or by succession, subject to the execution of the power.

Certain devises in trust to be deemed powers.

§ 228. Where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, is liable to the claims of the creditors of such person, in the same manner as other personal property which cannot be reached by execution.

Profits of land liable to creditors in certain cases.

§ 229. Where an express trust is created for any purpose not enumerated in the preceding sections, no estate vests in the trustees; but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, is valid as a power in trust, subject to the provisions in relation to such powers, contained in title V of this Part of the Civil Code.

Other express trusts to be powers in trust.

§ 230. In every case where the trust is valid as a power, the real property to which the trust relates, remains in, or passes by succession to, the persons otherwise entitled, subject to the execution of the trust as a power.

And land, &c., to descend to persons entitled.

Trustees of express trusts to have whole estate.

§ 231. Every express trust, valid as such, in its creation, except as herein otherwise provided, vests the whole estate in the trustees, subject only to the execution of the trust. The persons for whose benefit the trust is created, take no estate or interest in the property, but may enforce the performance of the trust.

This section does not prevent any person creating a trust, from declaring to whom the real property to which the trust relates shall belong, in the event of the failure or termination of the trust; nor from transferring or devising such property, subject to the execution of the trust. Every such grantee or devisee acquires a legal estate in the property, as against all persons except the trustees and those lawfully claiming under them.

Interests remaining in grantor of express trust.

§ 232. Where an express trust is created, every estate and interest not embraced in the trust, and not otherwise disposed of, remains in, or reverts to, the persons creating the trust, or his successors.

Powers over trust of party interested.

§ 233. No person beneficially interested in a trust for the receipt of the rents and profits, can transfer or in any manner dispose of such interest; but the rights and interest of every person for whose benefit a trust for the payment of a sum in gross is created, are transferable.

Effect of omitting trust in conveyance.

§ 234. Where an express trust is created, but is not contained or declared in the conveyance to the trustees, such conveyance must be deemed absolute, as against the subsequent creditors of the trustees, not having notice of the trust, and as against purchasers from such trustees, without notice, and for a valuable consideration.

Certain sales, &c., by trustees, void.

§ 235. Where the trust is expressed in the instrument creating the estate, every sale, conveyance or other act of the trustees, in contravention of the trust, is absolutely void.

Property may be granted to literary institutions in trust.

§ 236. Property may be transferred or devised to any incorporated college or other incorporated literary institution in this state, to be held in trust for any of the following purposes:

1. To establish and maintain an observatory;

2. To found and maintain professorships and scholarships;

3. To provide and keep in repair a place for the burial of the dead; or

4. For any other specific purposes comprehended in the general objects authorized by their respective charters. Such trusts may be created, subject to such conditions and visitations as may be prescribed by the grantor or donor, and agreed to by the trustees; and all property hereafter granted to such a college or institution in trust for either of the aforesaid purposes, may be held by them upon such trusts, and subject to such conditions as may be so prescribed and agreed.

This and the two following sections are from the Laws of 1840, ch. 318.

To cities and villages.

§ 237. Property may be transferred or devised to the corporation of any city or village of this state to be held in trust for any purpose of education, or the diffusion of knowledge, or for the relief of distress, or for parks, gardens or other ornamental grounds, or grounds for the purpose of military parades and exercise, or health and recreation, within or near such incorporated city or village, upon such conditions as may be prescribed by the grantor or donor, and agreed to by such corporation; and all real property so granted or conveyed to such corporation may be held by the same, subject to such conditions as may be so prescribed and agreed.

For use of common schools.

§ 238. Property may be transferred or devised to the school commissioners of any town, and to the trustees of any school district, in trust for the benefit of common schools of such town, or for the benefit of the schools of such district.

Special laws.

§ 239. Other trusts are valid in the cases provided by charters and special statutes.

When estate of trustee to cease.

§ 240. When the purposes for which an express trust was created ceases, the estate of the trustees also ceases.

# TITLE V.

## POWERS.

The provisions of this title are from 1 R. S., 732; omitting § 147 which is embodied in the chapter on the Enjoyment of Property.

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295. Married women, their authority.
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300. Terms "grantor of a power" and "grantee of a power" defined.

Certain powers abolished.

§ 241. Powers, in relation to real property, are abolished, except as provided in this title.

Definition of a power.

§ 242. A power, as the term is used in this title, is an authority to do some act in relation to real property, or the creation of an estate therein, or of charges thereon, which the owner granting or reserving such power might himself lawfully perform.

Who may grant powers.

§ 243. No person is capable of granting a power who is not at the same time capable of transferring some interest in the property to which the power relates.

Division of powers.

§ 244. Powers are general or special, and beneficial or in trust.

Definition of general powers.

§ 245. A power is general where it authorizes the alienation in fee by means of a conveyance, will or charge, of the property embraced in the power, to any alienee whatever.

§ 246. A power is special:

Definition of special powers.

1. Where a person or class of persons, to whom the disposition of the lands under the power is to be made, is designated;

2. Where the power authorizes the alienation, by means of a conveyance, will, or charge, of a particular estate or interest less than a fee.

Beneficial powers.

§ 247. A general or special power is beneficial when no person other than the grantee has, by the term of its creation, any interest in its execution.

Powers to married women.

§ 248. A general and beneficial power may be given to a married woman to dispose, during her marriage, and without the concurrence of her husband, of real property conveyed or devised to her in fee.

Estate of tenant for life, &c., when changed into a fee.

§ 249. Where an absolute power of disposition, not accompanied by any trust, is given to the owner of a particular estate for life or years, such estate is changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estates limited thereon, in case the power should not be executed or the property should not be sold for the satisfaction of debts.

Certain powers create a fee.

§ 250. Where a like power of disposition is given to any person to whom no particular estate is limited, such person also takes a fee, subject to any future estate that may be limited thereon, but absolute in respect to creditors and purchasers.

Id.

§ 251. In all cases where such power of disposition is given, and no remainder is limited on the estate of the grantee of the power, such grantee is entitled to an absolute fee.

Effect of power to devise inheritance in certain cases.

§ 252. Where a general and beneficial power to devise the inheritance is given to a tenant for life or for years, such tenant is deemed to possess an absolute power of disposition, within the last three sections.

Power to dispose of fee.

§ 253. Every power of disposition is deemed absolute, by means of which the grantee is enabled in his lifetime to dispose of the entire fee for his own benefit.

Power to revoke.

§ 254. Where the grantor in any conveyance reserves to himself, for his own benefit, an absolute power of revocation, such grantor is still to be deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned.

§ 255. A special and beneficial power may be granted: Special and beneficial powers, who may take.

1. To a married woman, to dispose, during the marriage, and without the concurrence of her husband, of any estate less than a fee, belonging to her, in the property to which the power relates;

2. To a tenant for life of the property embraced in the power, to make leases for not more than twenty-one years, and to commence in possession during his life.

§ 256. The power of a tenant for life to make leases is not assignable as a separate interest, but is annexed to his estate, and will pass (unless specially excepted) by any conveyance of such estate. If specially excepted in any such conveyance, it is extinguished. Power to make leases by tenant for life.

§ 257. Such power may be released by the tenant to any person entitled to an expectant estate in the property, and shall thereupon be extinguished. Release of such power.

§ 258. A mortgage executed by a tenant for life having a power to make leases, or by a married woman, by virtue of any beneficial power, does not extinguish or suspend the power; but the power is bound by the mortgage in the same manner as the lands embraced therein. Mortgages by party having power to lease, &c.

§ 259. The effects of such a lien by mortgage on the power, are: Effect thereof.

1. That the mortgagee is entitled to an execution of the power, so far as the satisfaction of his debt may require;

2. That any subsequent estate created by the owner, in execution of the power, becomes subject to the mortgage in the same manner as if in terms embraced therein.

§ 260. Every special and beneficial power is liable to the claims of creditors, in the same manner as other interests that cannot be reached by execution, and the execution of the power may be adjudged for the benefit of the creditors entitled. Beneficial powers liable to creditors.

§ 261. A general power is in trust when any person or class of persons, other than the grantee of such power, is designated as entitled to the proceeds, or any portion of General powers, when in trust.

the proceeds, or other benefits to result from the alienation of the lands according to the power.

Special powers, when in trust.

§ 262. A special power is in trust:

1. When the disposition which it authorizes is limited to be made to any person or class of persons, other than the grantee of such power;

2. When any person or class of persons, other than the grantee, is designated as entitled to any benefit from the disposition or charge authorized by the power.

Trust powers imperative.

§ 263. Every trust power unless its execution or non-execution is made expressly to depend on the will of the grantee, is imperative and imposes a duty on the grantee, the performance of which may be compelled, for the benefit of the parties interested.

Effect of right of selection.

§ 264. A trust power does not cease to be imperative when the grantee has the right to select any, and exclude others, of the persons designated as the objects of the trust.

Construction of certain powers

§ 265. Where a disposition under a power is directed to be made to, or among or between several persons, without any specification of the share or sum to be allotted to each, all the persons designated are entitled in equal proportion.

But when the terms of the power import that the estate or fund is to be distributed between the persons so designated, in such manner or proportions as the trustee of the power may think proper, the trustee may allot the whole to any one or more such persons in exclusion of the others.

When court to execute power.

§ 266. If the trustee of a power, with the right of selection, dies leaving the power unexecuted, its execution must be adjudged for the benefit equally of all the persons designated as objects of the trust.

Id.

§ 267. Where a power in trust is created by will, and the testator has omitted to designate by whom the power is to be exercised, its execution devolves on the supreme court.

§ 268. The provisions of the title on Trusts, saving the rights of other persons from prejudice by the misconduct of trustees, and authorizing the court to remove and appoint trustees; the provisions of the chapter on Succession, devolving express trusts on the court, upon the death of the trustee; and the provision of section 240, in the title on Uses and Trusts, apply equally to powers in trust, and the grantees of such powers.

Application of certain prior sections.

§ 269. The execution, in whole or in part, of any trust power may be adjudged for the benefit of the creditors or assignees of any person entitled as one of the objects of the trust, to compel its execution, when the interest of the objects of such trust is assignable.

Execution of trust power, when compelled by creditors, &c.

§ 270. Every beneficial power, and the interest of every person entitled to compel the execution of a trust power, passes to the assignees, pursuant to statute, of the estate of a non-resident, absconding insolvent or imprisoned debtor, or of the estate of an idiot, lunatic, person of unsound mind, or drunkard.

Beneficial powers, &c. how affected by insolvent assignments, &c.

§ 271. The grantor in any conveyance, may reserve to himself any power, beneficial or in trust, which he might lawfully grant to another; and every power thus reserved is subject to the provisions of this title, in the same manner as if granted to another.

Reservation of powers in conveyances.

§ 272. A power may be granted:

How powers to be granted.

1. By a suitable clause contained in a conveyance of some estate in the real property to which the power relates;

2. By a devise contained in a will.

§ 273. Every power is a lien or charge upon the lands which it embraces, as against creditors and purchasers in good faith and without notice of or from any person having an estate in such lands, only from the time the instrument containing the power is duly recorded. As against all other persons the power is a lien from the time the instrument in which it is contained takes effect.

When powers to be recorded.

When powers irrevocable.

§ 274. Every power, beneficial or in trust, is irrevocable, unless an authority to revoke it is granted or reserved in the instrument creating the power.

Who to exercise powers.

§ 275. A power may be vested in any person capable in law of holding, but cannot be exercised by any person not capable of transferring real property, except in the single case mentioned in the next section.

Married women.

§ 276. A married woman may execute a power during her marriage, by grant or devise, as may be authorized by the power, without the concurrence of her husband, unless by the terms of the power its execution by her during marriage is expressly or impliedly prohibited.

Id.

§ 277. No power vested in a married woman, during her minority, can be exercised by her, until she attains her full age.

Execution by survivors, &c.

§ 278. Where a power is vested in several persons, all must unite in its execution; but if previous to such execution, one or more of such persons die, the power may be executed by the survivor or survivors.

How executed.

§ 279. No power can be executed except by a written instrument which would be sufficient to pass the estate or interest intended to pass under the power, if the person executing the power were the actual owner.

Instruments deemed conveyances.

§ 280. Every instrument except a will, in execution of a power, and although the power may be a power of revocation only, is to be deemed a conveyance within the chapter on Recording Transfers.

Execution of power to dispose by devise.

§ 281. Where a power to dispose of real property is confined to a disposition by devise or will, the instrument of execution must be a will duly executed according to the provisions of the title on Wills.

Execution of power to dispose by grant.

§ 282. Where a power is confined to a disposition by grant it cannot be executed by will, although the disposition is not intended to take effect until after the death of the person executing the power.

§ 283. When a married woman executes a power by grant, the concurrence of her husband as a party is not requisite, [but the grant is not a valid execution of the power unless acknowledged by her as provided in the chapter on Recording Transfers.]

Married women to acknowledge execution.

It is proposed to omit the words in brackets.

§ 284. Where the grantor of a power has directed or authorized it to be executed by an instrument not sufficient in law to pass the estate, the power is not void, but its execution is to be governed by the rules before prescribed in this title.

Directions by grantor.

§ 285. When the grantor has directed any formalities to be observed in the execution of the power, in addition to those which would be sufficient to pass the estate, the observance of such additional formalities is not necessary to a valid execution of the power.

Id.

§ 286. Where the conditions annexed to a power are merely nominal and evince no intention of actual benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded in the execution of the power.

Nominal conditions.

§ 287. With the exceptions contained in the preceding sections, the intentions of a grantor of a power as to the mode, time and conditions of its execution must be observed, subject to the power of the supreme court to supply a defective execution in the cases hereinafter provided.

When directions of grantor to be observed

§ 288. When the consent of a third person to the execution of a power is requisite, such consent must be expressed in the instrument by which the power is executed or be certified in writing thereon. In the first case the instrument of execution, in the second, the certificate, must be subscribed by the party whose consent is required; and to entitle the instrument to be recorded such signature must be duly proved or acknowledged, according to the chapter on Recording Transfers.

Consent of third person to execution of power.

§ 289. No disposition by virtue of a power is void on the ground that it is more extensive than was authorized

Certain dispositions not void.

by the power; but every estate or interest so created, so far as embraced by the terms of the power, is valid.

**Omission to recite power.**

§ 290. Every instrument executed by the grantee of a power, conveying an estate or creating a charge which such grantee would have no right to convey or create except by virtue of his power, is to be deemed a valid execution of the power, although such power be not recited or referred to therein.

**Fraud.**

§ 291. Instruments in execution of a power are affected by fraud in the same manner as conveyances by owners or trustees.

**Power to devise, how executed by terms of will.**

§ 292. Real property embraced in a power to devise passes by a will purporting to convey all the real property of the testator, unless the intent that the will should not operate as an execution of the power appears expressly or by necessary implication.

**Computation of term of suspensions.**

§ 293. The period during which the absolute right of alienation may be suspended by an instrument in execution of a power, must be computed, not from the date of the instrument, but from the time of the creation of the power.

**Who may take under powers.**

§ 294. No estate or interest can be given or limited to any person, by an instrument in execution of a power, which such person would not have been capable of taking under the instrument by which the power was granted.

**Married women, their authority.**

§ 295. When a married woman, entitled to an estate in fee, is authorized by a power to dispose of such estate during her marriage, she may by virtue of such power create any estate which she might create if unmarried.

**Defective execution.**

§ 296. Where the execution of a power in trust is defective, in whole or in part, under the provisions of this title, its proper execution may be adjudged in favor of the persons designated as the objects of the trust.

**Id.**

§ 297. Purchasers for a valuable consideration, claiming under a defective execution of a power, are entitled to the same relief as similar purchasers claiming under a defective conveyance from an actual owner.

§ 298. Where a power to sell real property is given to the grantee in any mortgage or other conveyance intended to secure the payment of money, the power is to be deemed a part of the security, and vests in and may be executed by any person, who by assignment or otherwise, becomes entitled to the money so secured to be paid.

**Powers to sell in mortgages.**

§ 299. The provisions of this title do not extend to a simple power of attorney to convey real property in the name of and for the benefit of the owner.

**Application of this title.**

§ 300. The term "grantor of a power" as used in this title designates the person by whom a power is created, whether by grant or devise; and the term "grantee of a power" designates the person in whom a power is vested, whether by grant, devise or reservation.

**Terms "grantor of a power" and "grantee of a power," defined.**

# PART III.

## PROPERTY IN THINGS PERSONAL, OR MOVABLE.

TITLE I. Personal Property in General.
II. Particular Kinds of Personal Property.

## TITLE I.

### PERSONAL PROPERTY IN GENERAL.

SECTION 301. What is personal property.
302 Distinction of things personal.
303. Qualifications of property.
304. Future interests in perishable property, how protected.
305. By what law governed.
306. Suspension of alienation and accumulations.
307. Trusts.
308. Powers.

**What is personal property.**

§ 301. Every kind of property which is not real is personal.

**Distinction of things personal.**

§ 302. Things personal are either: 1. Things in possession, or 2. Things in action.

**Qualifications of property.**

§ 303. Property in things personal may be absolute or qualified. The qualification may exist in respect to the number of those who are to enjoy it, or in respect to the time and manner of enjoyment, or in any other respect consistent with the rules prescribed in the next title.

**Future interests in perishable property, how protected.**

§ 304. Where one has the present and another the future interest in a thing personal, and the thing is perishable or consumed in the using, the latter may require the thing to be sold and the proceeds invested for the benefit of both parties, according to their respective interests.

By what law governed.

§ 305. If there is no law to the contrary in the place where personal property is situated, it is deemed to follow the person of its owner and is governed by the law of his domicil.

Suspension of alienation, and accumulations.

§ 306. The provisions of title II, of part II, of this division of the Civil Code, which relate to the suspension of the absolute power of alienation, and to accumulations of income, in respect to real property, apply also to personal property, so far as they are applicable.

1 R. S., 773; Mason *a.* Jones, 2 Barb., 229.

Trusts.

§ 307. The provisions of title IV of part II of this division of the Civil Code, which authorize certain literary and municipal corporations and officers to hold in trust, and which relate to the determination of the trustee's estate when the purpose of a trust ceases, apply also to personal property; and the provisions of the same title, which relate to the inalienability of trusts, apply also to personal property so far as they are applicable.

The provision of this section, which relates to the inalienability of trusts, is new.

Powers.

§ 308. The provisions of title V of part II of this division of the Civil Code, entitled Powers, apply to powers in respect to personal property so far as the same are applicable thereto, excepting powers of attorney, of agency and of substitution.

This provision is new.

# TITLE II.

## PARTICULAR KINDS OF PERSONAL PROPERTY

CHAPTER I. Things in action.
II. Shipping.
III. Corporations.
IV. Products of the mind.
V. Other kinds of personal property.

## CHAPTER I.

### THINGS IN ACTION.

SECTION 309. Things in action defined.
310. Transfer and survivorship.

Things in action defined.

§ 309. The right to recover, by judicial proceedings, money or other property, arising out of: 1. The violation of a personal right; 2. The violation of a right of property; or 3. An obligation; and all other right to property not in possession, is called a thing in action.

Transfer and survivorship.

§ 310. Things in action, arising out of the violation of a right of property, or out of a contract, may be transferred by assignment. Upon the death of the owner they pass to his personal representatives, except where, in the cases provided in the Code of Civil Procedure, they pass to his devisees or successor in office.

This section is proposed to establish one rule for the assignability and the survivorship of things in action. Though the cases on this subject are conflicting, this view is generally received. See McKee *a.* Judd, 12 *N. Y.*, 622; Meech *a.* Stoner, 19 *id.*, 26.

## CHAPTER II.

### SHIPPING.

ARTICLE I. Shipping defined.
II. The title to shipping.
III. The employment of shipping.
IV. Charter parties.
V. Rules of navigation.

## ARTICLE I.

### SHIPPING DEFINED.

SECTION 311. Definition of a ship.
312. Appurtenances and equipments.
313. Foreign and domestic navigation.
314. Foreign and domestic ships distinguished.

**Definition of a ship.**

§ 311. A ship is a structure fitted for navigation. Every kind of ship is included in the term "shipping."

**Appurtenances and equipments.**

§ 312. The appurtenances of a ship are whatever things, belonging to the owners, are on board the ship, connected with its proper use, for the objects of the voyage and adventure in which the ship is engaged. The equipments of a ship are all the appurtenances except the stores.

See the cases on this subject in 1 *Pars. Mar. L.*, 71.

**Foreign and domestic navigation.**

§ 313. Ships are engaged either in foreign or domestic navigation, or in the fisheries. The first pass between the United States and a foreign country; the others from port to port in the United States.

**Foreign and domestic ships distinguished.**

§ 314. A ship in a port of the state to which she belongs is called a domestic ship; in another port she is called a foreign ship.

## ARTICLE II.

### THE TITLE TO SHIPPING.

SECTION 315. Registry, enrollment, and license.
316. Master's power to sell.
317. Transfers.

§ 315. Ships engaged in foreign navigation must be registered; those engaged in domestic navigation or in the fisheries must be enrolled and licensed, or licensed only, if under twenty tons. The instruments by which ships are registered, enrolled, or licensed, are defined and regulated by act of Congress. **Registry, enrollment and license.**

§ 316. When a ship, whether foreign or domestic,[1] is injured, the master, in case of necessity,[2] may sell it without instructions from the owners; but if, by the earliest use of ordinary means of communication, he can inform the owners, and await their instructions, he must do so before selling. **Master's power to sell.**

[1] Scull *a.* Briddle, 2 *Wash. C. C.*, 150; brig Sarah Ann, 13 *Pet.*, 387, affirming 2 *Sumn.*, 206.
[2] Somes *a.* Sugrue, 4 *C. & P.*, 276.

§ 317. The title to a ship can only be transferred in the mode prescribed by the chapter on Transfers. **Transfers.**

## ARTICLE III.

### THE EMPLOYMENT OF SHIPPING.

SECTION 318, 319. Several owners.
320. Duties of manager.
321, 322. Powers of manager.
323. Compensation.
324. Owner for the voyage.
325. Carriage.

§ 318. If a ship belongs to a partnership it is held like any other personal property of the partnership. If it belongs to two or more persons not partners, each has his individual share without any control over the rest. If **Several owners.**

the part owners differ as to the use or the repair of the ship, the controversy may be determined by any court of competent jurisdiction.

3 Kent, 153, 154. The last provision is intended to establish a rule for all cases of difference, whether a majority concur in one opinion or not.

Several owners.

§ 319. Part owners of a ship do not, by simply using the ship in a joint enterprise, become partners as to the ship.

This section is new.

Duties of manager.

§ 320. The general agent for the owners, in respect to the care of a ship and freight, is called the manager; if he is a part owner he is also called the managing owner. Unless otherwise directed, it is his duty to provide for the complete sea-worthiness of the ship; to take care of her in port; to see that she is provided with necessary papers, with a proper master, mate and crew, and supplies of provisions and stores.

Powers of manager.

§ 321. He has power to make contracts requisite for the performance of these duties; to enter into charter parties or make contracts for freight; and to settle for freight and adjust averages.

Id.

§ 322. Without special authority he cannot borrow money, nor give up the lien for freight, nor purchase a cargo, nor bind the owners to an insurance.

1 Bell, Com., 4 ed., 410, 411. The manager is sometimes called the ship's husband, but we have not used the phrase in the text of the Code.

Compensation.

§ 323. A managing owner has no right to compensation in the absence of agreement or usage.[1]

[1] Benson *a.* Heathorn, 1 *Young* and *C.*, 326; Smith *a.* Lay, 3 *Kay* and *Johns*, 105.

Owner for the voyage.

§ 324. If the owner commits the possession and navigation of the ship to another, that other and not the owner is responsible for its repairs and supplies.

3 *Kent*, 133; Hesketh *a.* Stevens, 7 *Barb.*, 488.

Carriage.

§ 325. The rights and liabilities of ship owners as carriers are regulated by the chapter on Carriage.

## ARTICLE IV.

### CHARTER PARTIES.

§ 326. The contract by which a ship is let is termed a charter party. It may either let the capacity or burden of the ship, continuing the employment of the owner's master, crew and equipments, or it may surrender the entire ship to the charterer, who then provides them himself. The master or a part owner may be a charterer. The obligations of the parties are regulated by the provisions of the Third Division of this Code.

Charter party defined.

Obligations of parties.

[1] 1 *Pars. Mar. L.*, 229, &c.

## ARTICLE V.

### RULES OF NAVIGATION.*

SECTION 327. Collisions.
1. Rules as to ships meeting each other.
2. The rule for sailing vessels.
3. Rules for steamers in narrow channels.
4. Rules for steam vessels on different courses.
5. Meeting of steamers.
328. Collision from breach of rules.
329. Breaches of such rules to imply willful default.
330. Loss, how apportioned.

§ 327. In the case of ships meeting, the following rules must be observed in addition to those prescribed by article 2 of chapter 1 of title III of part III of the POLITICAL CODE, relating to Navigation:

Collisions.

1. Whenever any ship, whether a steamer or sailing ship, proceeding in one direction, meets another ship, whether a steamer or sailing ship, proceeding in another direction, so that if both ships were to continue their respective courses they would pass so near as to involve risk of a collision,

Rules as to ships meeting each other.

* The subjects of Pilotage and Wrecks are regulated by the POLITICAL CODE.

the helms of both ships must be put to port so as to pass on the port side of each other; and this rule applies to all steamships and all sailing ships, whether on the port or starboard tack, and whether close hauled or not, except where the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger, and subject also to a due regard to the dangers of navigation, and, as regards sailing ships on the starboard tack close-hauled, to the keeping such ships under command.[1]

**The rule for sailing vessels.**

2. In the case of sailing vessels, those having the wind fair must give way to those on a wind. When both are going by the wind, the vessel on the starboard tack must keep her wind, and the one on the larboard tack bear up strongly, passing each other on the larboard hand. When both vessels have the wind large or abeam, and meet, they must pass each other in the same way on the larboard hand, to effect which two last-mentioned objects the helm must be put to port. Steam vessels must be regarded as vessels navigating with a fair wind, and should give way to sailing vessels on a wind of either tack.[2]

**Rules for steamers in narrow channels.**

3. A steamer navigating a narrow channel must, whenever it is safe and practicable, keep to that side of the fair way or mid-channel which lies on the starboard side of the steamer.[3]

4. A steamer when passing another steamer in such channel, must always leave the other upon the larboard side.[4]

**Rule for steam vessels on different courses.**

5. When steamers must inevitably or necessarily cross so near that, by continuing their respective courses, there would be a risk of collision, each vessel must put her helm to port, so as always to pass on the larboard side of each other.[5]

**Meeting of steamers.**

The rules of this section do not apply to any case for which a different rule is provided by the regulations for the government of pilots of steamers approaching each other within sound of the steam-whistle, and regulations

for displaying lights upon steamers, prescribed under authority of the act of Congress, approved August 30, 1852.*

[1] This rule is from the English Mercantile Shipping Act of 1854. 17 and 18 *Vic.*, *c.* 104.

[2] This rule is from the Rules of Navigation of Trinity House, 1840.

[3] 17 and 18 *Vic.*, *c.* 104 (*supra*).

[4] Rules of Trinity House (*supra*)

[5] Rules of Trinity House (*supra*).

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* Those rules are as follows:

All pilots of steamers navigating seas, gulfs, lakes, bays, or rivers (except rivers emptying into the Gulf of Mexico, and their tributaries) when meeting or approaching each other, whether by day or by night, and as soon as within sight and fully within sound of the steam-whistle, shall observe and comply with the following

REGULATIONS:

RULE 1. When steamers meet "head and head," it shall be the duty of each to pass to the right or on the larboard side of the other. And either pilot, upon determining to pursue this course, shall give, as a signal of his intention, *one* short and distinct blast of his steam-whistle, which the other shall answer promptly by a similar blast of the whistle. But of the course of each steamer is so far on the starboard of the other as not to be considered by the rules as meeting "head and head," or if the vessels are approaching in such a manner, that passing to the right (as above directed) is deemed unsafe, or contrary to rule, by the pilot of either vessel, the pilot so deciding shall immediately give *two* short and distinct blasts of his steam-whistle, which the other pilot shall answer promptly by *two* similar blasts of his whistle, and they shall pass to the left, or on the starboard side of each other. NOTE.—*In the night*, steamers will be considered meeting "head and head," so long as both the colored lights of each are in view of the other. *In the day*, a similar position will also be considered "head and head."

RULE 2. When steamers are approaching each other in an oblique direction (as shown in diagram of fifth situation), they will pass to the right, as if meeting "head and head," and the signal, by whistle, shall be given and answered promptly, as in that case specified.

RULE 3. If, when steamers are approaching each other the pilot of either vessel fails to understand the course or intention of the other, whether from the signals being given and answered erroneously, or from other cause, the pilot, so in doubt, shall immediately signify the same by giving several short and rapid blasts of the steam-whistle, and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerage way, until the proper signals are given, answered, and understood, or until the vessels shall have passed each other.

RULE 4. When steamers are running in a fog, or thick weather, it shall be the duty of the pilot to cause a *long* blast of the steam-whistle to be sounded at intervals not exceeding two minutes. And no steamer shall, in any case, be justified in coming into collision with another vessel if it be possible to avoid it.

RULE 5. Whenever a steamer is nearing a short bend or curve in the channel, where, from the height of the banks or other cause, a steamer approaching from the opposite direction cannot be seen for a distance of half a mile, the pilot of such steamer, when he shall have arrived within half a mile of such curve or bend, shall give a signal by *one* long blast of the steam-whistle, which signal shall be answered by a similar blast given by the pilot of any approaching steamer that may be within hearing. Should such signal be so answered by a steamer upon the further side of such bend, then the usual signals for meeting and passing shall immediately be given and answered. But if the *first* alarm signal of such pilot be not answered, he is to consider the channel clear and govern himself accordingly.

RULE 6. The signals by blowing of the steam-whistle shall be given and answered by pilots in compliance with these rules, not only when meeting "head and head," or nearly so, but at all times, when passing or meeting, at a distance within half a mile of each other, and whether passing to the starboard or larboard.

N. B.—The foregoing rules are to be complied with in all cases, except when steamers are navigating in a crowded channel or in the vicinity of wharves,—under these circumstances steamers must be run and managed with great caution, sounding the whistle as may be necessary to guard against collision or other accidents.

STEAMERS' LIGHTS, TO PREVENT COLLISION AT NIGHT.

RULE 7. *When under Weigh.* All steamers rigged for carrying sail must carry a bright, white light at the foremast head, and all other steamers must carry a bright, white light on the *stem* or near the bow, and another on a mast near the stern, or on the flag-staff at the *stern*, the last named being at an elevation of at least twenty feet above all other lights upon the steamer. All steamers must carry a green light upon the starboard side, and a red light on the port side.

If collision ensues from breach of the above rules, owner not to be entitled to recover.

§ 328. If it appears that a collision was occasioned by failure to observe any rule of the foregoing section, the owner of the ship by which such rule is infringed, cannot recover compensation for damages sustained by the ship in such collision, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the rule necessary.

Breaches of such rules to imply willful default.

§ 329. Damage to person or property, arising from the failure of a ship to observe any rule of section , must be deemed to have been occasioned by the willful default of the person in charge of the deck of such ship at the time, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the rule necessary.

Loss, how apportioned.

§ 330. Losses caused by collision are to be borne as follows:

1. The party in fault must bear his own loss, and compensate the other for the loss he may sustain;

2. If neither was in fault, the loss must be borne by him on whom it falls;

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NOTE.— Steamers, although rigged for carrying sail, instead of the foremast head light, may adopt the forward and stern lights provided for steamers *not* rigged for carrying sail; provided such lights are so arranged and placed on the vessel as to secure the contemplated objects.

*When at Anchor.* A bright, white light at least twenty feet above the surface of the water. The lantern so constructed and placed as to show a good light all around the horizon.

FIRST. The masthead light of steamers rigged for carrying sail to be visible at a distance of at least five miles in a clear dark night, and the lantern to be so constructed as to show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, namely: from right ahead to two points abaft the beam on either side of the ship.

SECOND. The stem and stern lights of steamers not rigged for carrying sail to be visible at a distance of at least five miles in a clear dark night, and the respective lanterns to be so constructed that the stem light shall show a uniform and unbroken light over an are of the horizon of twenty points of the compass, namely: from right ahead to two points abaft the beam on either side of the ship, and that the stern light shall show a uniform light all around the horizon.

THIRD. The colored side lights to be visible at a distance of at least two miles in a clear dark night; and the lanterns to be so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, namely: from right ahead to two points abaft the beam on their respective sides.

FOURTH. The side lights are to be fitted with inboard screens of at least *six feet* in length (clear of the lantern), to prevent them from being seen across the bow. The screens are to be placed in a fore and aft line with the inner edge of the side lights, and in contact therewith.

NOTE FIRST. The object of carrying the bright white light at the foremast head of steamers rigged for carrying sail is merely to intimate to other vessels the approach or presence of such steamer.

NOTE SECOND. The object of the colored lights required to be carried on *all* steamers, is to indicate to other vessels the course or direction such steamer may be steering.

NOTE THIRD. The object of requiring steamers not rigged for carrying sail to carry a white stern light in connection with a white light on the stem or near the bow, is to provide (when the vessel's rig will admit of it) a method of determining, by a central range of lights, more correctly the course that such vessel is running.

3. If both were in fault the loss is to be equally divided, unless it is shown that there was a great disparity in fault, in which case the loss must be equitably apportioned;

4. If it cannot be ascertained where the fault lies, the loss must be equally divided.

This declares the law according to well settled adjudications, except perhaps in respect to rule 3, where there is some conflict of authorities. See 1 *Pars. Mar. L.*, 187.

## CHAPTER III.

### CORPORATIONS.

ARTICLE I. The creation of corporations.
II. Stock.
III. Corporate powers.
IV. Dissolution of corporations.

## ARTICLE I.

### THE CREATION OF CORPORATIONS.

SECTION 331. Corporations defined.
332. How created.
333. Reservation of power to repeal.
334. Distinction of corporations.
335. Public corporations defined.
336. Private corporations.
337. Corporations for religion.
338. Corporations for benevolence.
339. Corporations for profit.
340. Charters.
341, 342. Acceptance of charter.
343. Dealers with a corporation cannot question its corporate existence.
344. Name.
345. Who are corporators.

§ 331. A corporation is a creature of the law, having certain powers and duties of a natural person. Being created by the law it may continue for any length of time which the law prescribes. Corporations defined.

§ 332. A corporation can only be created by authority of a statute. But the statute may be special for a par- How created.

ticular corporation, or general for a number of corporations.

Reservation of power to repeal.

§ 333. Every grant of corporate power is subject to alteration, suspension or repeal, in the discretion of the legislature.

1 R. S., 600, § 7.

Distinction of corporations.

§ 334. Corporations are either:

1. Public; or,

2. Private.

Public corporations defined.

§ 335. A public corporation is one that has for its object the government of a portion of the state; such corporations are regulated by the POLITICAL CODE, and by local statutes.

Private corporations.

§ 336. Private corporations are of three kinds:

1. Corporations for religion;

2. Corporations for benevolence;

3. Corporations for profit.

They may be formed for the purposes hereafter enumerated, in the way prescribed by general laws respectively applicable thereto.

Corporations for religion.

§ 337. Corporations for religion may be formed in the following cases:

1. The male persons of full age of any church or congregation in communion with the Protestant Episcopal Church may form a corporation for the purposes of that church;[1]

2. The minister and officers of any Reformed Protestant Dutch church or congregation may form a corporation for the purposes of that church;[2]

3. The minister and officers of any Reformed Presbyterian church or congregation may form a corporation for the purposes of that church;[3]

[1] 2 R. L., 212; same stat., 2 R. S., 5th ed., 604, 612.
[2] 2 R. L., 212; same stat., 2 R. S., 5th ed., 606.
[3] 2 R. S., 5th ed., 612.

4. The male persons of full age belonging to any other church, congregation, or religious society, may form a corporation for the purposes of such church, congregation or society;[1]

5. Any seven or more citizens of the United States, of full age, and a majority of them residents of this state, may form a corporation to found and continue one or more free churches.[2]

Corporations for benevolence.

§ 338. Corporations for benevolence may be formed in the following cases:

1. By five or more citizens of the United States, of full age, a majority of whom are citizens and residents of this state, for benevolent, charitable, literary, scientific or missionary; or mission or other Sabbath-school purposes;[3]

2. By three or more residents of this state, for the purpose of founding or maintaining a library;[4]

3. By five or more citizens of the United States, of full age, for the purpose of promoting the fine arts;[5]

4. By seven or more residents of this state, for the purpose of procuring and holding lands to be used exclusively for a cemetery;[6]

5. By two or more persons, for the purposes of a private or family cemetry;[7]

6. By seven or more persons, for the purpose of constructing parks to be used for skating, and other lawful sports;[8]

7. By ten or more persons of full age, citizens of the United States, a majority of whom are citizens of this state, to form a county or town, agricultural or horticultural society.[9]

[1] 2 R. L., 212; 2 R. S., 5th ed., 606.
[2] Laws of 1854, ch. 218.
[3] Laws of 1848, ch. 319, as amended by laws of 1857, ch. 302, and 1861, ch. 239.
[4] Laws of 1853, ch. 395.
[5] Laws of 1860, ch. 242.
[6] Laws of 1847, ch. 133; 1854, ch. 112.
[7] Laws of 1854, ch. 112.
[8] Laws of 1861, ch. 149.
[9] Laws of 1855, ch. 425, as amended 1857, ch. 531.

The regents of the university may incorporate academies, and other institutions of learning, under general regulations established by them.[1]

Corporations for profit.

§ 339. Corporations for profit may be formed in the following cases:

1. By thirteen or more persons, for the purpose of marine insurance;[2] or for the purpose of making insurance on dwellings, stores, and other property, against losses by fire, and the risks of inland navigation and transportation;[3] or for the purpose of making insurance on life and health, and dealing in annuities;[4]

2. By twenty-five or more residents of any town or two adjoining towns, owning property, of not less than fifty thousand dollars in value which they desire to have insured, for the purpose of mutual insurance;[5]

3. By twenty or more residents of this state, for the purpose of mutual insurance against loss by thefts of horses, cattle or sheep, or expense in recovering such animals as may be stolen, or in the apprehension of the thief;[6]

4. By twenty-five or more persons, for the purpose of constructing and maintaining a railroad;[7]

5. By five or more persons, for the purpose of constructing and maintaining a plankroad or turnpike;[8] or for the purpose of constructing and maintaining a bridge across any stream;[9]

6. By fifteen or more persons, for the purpose of conducting a stage or omnibus route in the city of New York;[10]

[1] Laws of 1853, ch. 184.
[2] Laws of 1849, ch. 308, as restricted to Marine Insurance by the Laws of 1853, ch. 463, ch. 466.
[3] Laws of 1853, ch. 466.
[4] Laws of 1853, ch. 463.
[5] Laws of 1857, ch. 739; amended Laws of 1858, ch. 295.
[6] Laws of 1859, ch. 168.
[7] Political Code; Laws of 1850, ch. 140.
[8] Laws of 1847, ch. 210.
[9] Laws of 1848, ch. 259.
[10] Laws of 1854, ch. 142.

7. By three or more persons, for the purpose of conducting a ferry;[1]

8. By any number of persons, for constructing a telegraph;[2]

9. By any seven or more persons, for the purpose of providing and navigating upon the seas, ships to be propelled solely or partly by any expansive fluid;[3]

10. By five or more persons for the purpose of providing ships to be used upon lakes, rivers and canals;[4] or for the purpose of providing gas for lighting any city, town or village;[5]

11. By three or more persons, for the purpose of carrying on any manufacturing, mining, mechanical or chemical business, or printing and publishing books, pamphlets and newspapers;[6]

12. By nine or more persons, for the purpose of accumulating a fund for the purchase of real property, the erection of buildings or the making improvements, or paying off incumbrances on real property or aiding its members to do so;[7]

13. By five or more persons, for the erection of buildings;[8]

14. By five or more persons, for the purpose of breeding horses;[9] or for the purpose of importing and breeding domestic animals;[10] or for the purpose of mining and dealing in guano;[11]

Associations for the purpose of banking may also be formed in the mode provided by a general law specially applicable thereto.[12]

[1] Laws of 1853, ch. 135.
[2] Laws of 1848, ch. 265.
[3] Laws of 1852, ch. 228, as amended, Laws of 1853, ch. 124. There is another statute contemplating navigation on Lake George, Laws of 1854, ch. 3.
[4] Laws of 1854, ch. 232.
[5] Laws of 1848, ch. 37.
[6] Laws of 1848, ch. 40, as amended. Laws of 1857, ch. 262.
[7] Laws of 1851, ch. 122.
[8] Laws of 1853, ch. 117.
[9] Laws of 1854, ch. 269.
[10] Laws of 1857, ch. 776.
[11] Laws of 1857, ch. 546.
[12] Laws of 1838, ch. 260.

Charters.

§ 340. The instrument by which a corporation is constituted is called its charter, whether that be a statute, as in case of a special charter, or the document prescribed by a general statute, for the constitution of the corporation.

Acceptance of charter.

§ 341. In order to constitute a private corporation, there must not only be a statutory authority, but an acceptance of that authority by a majority of the corporators, or their agents.[1] The acceptance cannot be conditional or qualified.[2]

[1] Ang. & Ames on C., 75–77.
[2] Id., 80, 81; 3 Edw., 353.

Id.

§ 342. Except when otherwise expressly provided, such acceptance may be proved like any other fact.

Dealers with a corporation cannot question its corporate existence.

§ 343. One who assumes an obligation to an ostensible corporation, as such, cannot resist the obligation on the ground that there was in fact no such corporation, until that fact has been adjudged in a direct proceeding for the purpose.

Name.

§ 344. Every corporation must have a corporate name, which it has no power to change unless expressly authorized by law; but the name is to be deemed matter of description, so that a mistake in the name, in any instrument, may be disregarded if a sufficient description remains, by which to ascertain the corporation intended.

Ang. & Ames on C., 93, 94.

Who are corporators.

§ 345. Except when it is otherwise provided, any person becomes a corporator upon the issue to him of stock.

## ARTICLE II.

### STOCK.

SECTION 346. Subscriptions for stock.
347. Remedies for non-payment of subscription.
348. Issue of stock.
349. Transfers of stock.
350. Overissue of stock.
351. Purchase of stock by the corporation.
352. Dividends.

§ 346. A subscription to the stock of a corporation about to be formed, inures to the benefit of the corporation, when it is formed, and may be enforced by it. Subscriptions for stock.

Hamilton & Dansville Plankroad Co. *a.* Rice, 7 *Barb.*, 157; Poughkeepsie & Salt Point Plankroad Co. *a.* Griffin, 21 *Id.*, 454; Schenectady & Saratoga Plankroad Co. *a.* Thatcher, 11 *N. Y.*, 102; Lake Ontario, &c., R. R. Co. *a.* Mason, 16 *N Y.*, 451; Rensselaer & Washington Plankroad Co. *a.* Barton, 16 *Id.*, 457, *note.*

§ 347. When a corporation is authorized by the charter or the terms of the subscription to forfeit stock for the non-payment of the subscription, it may either forfeit the stock, or recover the amount of the subscription,[1] but cannot do both.[2] Remedies for non-payment of subscription.

[1] Harlem Canal Co. *a.* Seixas, 2 Hall, 504; The Same *a.* Spear, *Id.*, 510; Palmer *a.* Lawrence, 3 *Sandf.*, 161; Union Turnpike Co. *a.* Jenkins, 1 *Cai.*, 381; Goshen Turnpike Co. *a.* Hurtin, 9 *Johns.*, 217; Dutchess Cotton Manufactory *a.* Davis, 14 *Id.*, 238.

[2] Small *a.* Herkimer Manufacturing Co., 2 *N. Y.*, 330.

§ 348. Stock is issued by placing it in the name of the stockholder upon the books of the corporation;[1] unless the issue of a certificate of stock is required by the charter or by-laws, in which case the stock is issued by the execution and delivery of the certificate.[2] Issue of stock.

[1] Thorp *a.* Woodhull, 1 *Sandf. Ch.*, 411.

[2] Jones *a.* Terre Haute R. R. Co., 17 *How. Pr.*, 529.

§ 349. A certificate of stock may be transferred like any other personal property; and a transfer on the books of the corporation is not necessary, as between the parties to the transfer;[1] but a certificate is not a negotiable instrument,[2] and a transfer does not confer any greater rights against the corporation than the former holder of the stock possessed. Transfers of stock.

[1] Bank of Utica *a.* Smalley, 2 *Cow.*, 770; Commercial Bank *a.* Kortright, 22 *Wend.*, 348; Gilbert *a.* Manchester Iron Co., 11 *Wend.*, 627.

[2] Dunn *a.* Commercial Bank, 11 *Barb.*, 580; Stebbins *a.* Phœnix Fire Ins. Co., 3 *Paige*, 350; Mechanics' Bank *a.* N. Y. & New Haven R. R Co., 13 *N. Y.*, 599; McCready *a.* Rumsey, 6 *Duer*, 574.

Overissue of stock.

§ 350. A corporation whose capital is, by its charter, limited, either in amount or in number of shares, cannot issue valid certificates in excess of the limits.

Mechanics' Bank *a.* N. Y. & New Haven R. R. Co., 13 *N. Y.*, 599.

Purchase of stock by the corporation.

§ 351. Unless otherwise provided, a corporation may purchase, hold and transfer shares of its own stock.

City Bank of Columbus *a.* Bruce, 17 *N. Y.*, 507. But to the contrary was Barton *a.* Port Jackson Plankroad Co., 17 *Barb.*, 397.

Dividends.

§ 352. A dividend belongs to the person in whose name the stock stood on the books of the corporation on the day when it became payable.

## ARTICLE III.

### CORPORATE POWERS.

SECTION 353. General powers.
354, 355. By-laws and other powers.
356. Mode of acting.
357. Meetings and agencies.
358. Mode of exercising power.
359. General restriction.
360. Exercise of banking powers prohibited.
361. Liability of stockholders.
362. Quorum.
363. Powers of foreign corporations.
364. Their liabilities.

General powers.

§ 353. Every corporation, by virtue of its existence as such, has the following powers, unless otherwise expressly prescribed:

1. To have succession by its corporate name, for the period limited in its charter; and when no period is limited, perpetually; subject to the power of the legislature as hereinbefore provided;

2. To maintain and defend judicial proceedings;

3. To make and use a common seal, and alter the same at pleasure;

4. To hold, purchase and convey such real and personal property, as the purposes of the corporation require, not exceeding the amount limited in its charter;

5. To appoint such subordinate officers and agents, as the business of the corporation requires, and to allow them a suitable compensation;

6. To make by-laws not inconsistent with the law of the land, for the management of its property, the regulation of its affairs, and for the transfer of its stock;

2 R. S., 599.

7. To admit and remove members;

2 Kent's Com., 224.

8. To enter into any obligation essential to the transaction of its ordinary affairs.

Beers *a.* Phœnix Glass Co., 14 *Barb.*, 358; Partridge *a.* Badger, 25 *Id.*, 146; Mead *a.* Keeler, 24 *Id.*, 20; Curtis *a.* Leavitt, 15 *N. Y.*, 9.

By-laws, and other powers.

§ 354. The by-laws of a corporation are the regulations subordinate to the charter, prescribed for the government of its officers. They must be made, by the corporators in general meeting unless the charter prescribes a different body or a different mode.

This and the four following sections are new.

Id.

§ 355. The powers conferred, the duties prescribed, the time, place and manner of exercising the corporate powers, the means by which persons may become members or lose membership, the kind and number of officers, and the manner of their appointment or removal, are prescribed by the statutes relating to the corporations respectively, or the by-laws made in pursuance of those statutes.

Mode of acting.

§ 356. A corporation may act:

1. By writing, under the corporate seal;

2. By writing signed by an authorized agent;

3. By resolution of the corporators, directors, or other managing body;

4. By an authorized agent.

Meetings and agencies.

§ 357. Unless otherwise expressly authorized by its charter, the meetings of the corporators, directors or other managing body, must be held within the jurisdiction of the State by whose authority the corporation was created. It may, however, also have agencies elsewhere.

The meetings of a public corporation or of its officers must also be held within the limits of its own jurisdiction.

Mode of exercising power.

§ 358. Where the law confers power upon a corporation to do an act in a certain mode, its power is confined to the mode prescribed.

Farmers' Loan and Trust Company *a.* Carroll, 5 *Barb.*, 613; Brady *a.* Mayor, &c., of New York, 2 *Bosw.*, 173.

General restriction.

§ 359. Besides the powers and duties specified in this chapter, and such others as are expressly conferred by statute or may be necessary to the exercise of the powers so conferred, a corporation has no other power.

This and the three following sections are from 1 R. S., 600, §§ 3–6.

Exercise of banking powers prohibited.

§ 360. No corporation, not expressly incorporated for banking purposes, possesses the power of discounting bills, notes or other evidences of debt, of receiving deposits, of buying gold and silver bullion or foreign coins, of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt, upon loan or for circulation as money.

1 R. S., 600, § 4.

Liability of stockholders.

§ 361. When the whole capital of a corporation is not paid in, and the capital paid is insufficient to satisfy the claims of its creditors, each stockholder is bound to pay on each share held by him, the sum necessary to complete the amount of such share as fixed by the charter, or such proportion of that sum as is required to satisfy the debts of the corporation.

1 R. S., 600, § 5.

Quorum.

§ 362. When the corporate powers of any corporation are directed by its charter to be exercised by any particular body, or number of persons, a majority of such body, or persons, if it is not otherwise provided by the charter, is a sufficient number to form a board for the transaction of business. Such board must be convened in the mode prescribed by the charter, or by-laws, or by notice to all the members of such body within the state; and every decision of a majority of the persons thus duly assembled as a board, is valid.

1 R. S., 600, § 6.

§ 363. A foreign corporation can perform no act in this State, which is forbidden by the laws or is contrary to the policy of the state. Powers of foreign corporations.

§ 364. Every act of a foreign corporation done in this State is subject to its laws, and the corporation itself may be sued in the way prescribed by the Code of Civil Procedure. Their liabilities.

## ARTICLE IV.

### DISSOLUTION OF CORPORATIONS.

SECTION 365. Forfeiture for non-user.
366. Trustees in case of dissolution.
367. Their powers.
368. Proceedings to dissolve.
369. Revival.

§ 365. If any corporation hereafter created by the Legislature, does not organize and commence the transaction of its business within one year from the date of its incorporation, its corporate powers shall cease;[1] unless a different time within which its business must be commenced, is fixed by law.[2] Forfeiture for non-user.

[1] 1 R. S., 600, § 7.

[2] This qualification which by the Laws of 1846, ch. 155, was applied to Railroad Corporations, is here made applicable to all kinds.

§ 366. Upon the dissolution of any corporation, unless other persons are appointed by the Legislature, or by some court of competent authority, its directors or managers at the time of its dissolution become the trustees of the creditors and stockholders of the corporation dissolved, and have power to settle its affairs, collect and pay debts, and divide among the stockholders the property that remains after the payment of debts and necessary expenses; and for this purpose may maintain or defend any judicial proceeding. Trustees in case of dissolution.

1 R. S., 600, § 9.

§ 367. Such trustees are jointly and severally responsible to the creditors and stockholders of such corporation, to the extent of its property that comes into their hands. Their powers.

1 R. S., 601, § 10.

Proceedings to dissolve.

§ 368. The cases and mode in which corporators may be dissolved, and the mode in which the dissolution may be adjudged, are provided by the Code of Civil Procedure.

The reference is to the Code of Civil Procedure, as reported complete.

Revival.

§ 369. A corporation once dissolved can be revived only by the same power by which it could be created.

## CHAPTER IV.

### PRODUCTS OF THE MIND.

SECTION 370. How far the subject of property.
371. Joint authorship.
372. Transfer.
373. Effect of publication.
374. Subsequent inventor, author, &c.
375. Private writings.

How far the subject of property.

§ 370. The author of any product of the mind, whether it is an invention, or a composition in letters or art, or a design, delineation or other graphical representation, has an exclusive property therein, and in the representation or expression thereof, which continues so long as the product and the representations or expressions thereof, made by him, remain in his possession.

Joint authorship.

§ 371. Where several persons are jointly concerned in any such product of the mind, they are joint owners thereof.

If the product is single, the ownership is in equal proportions, unless otherwise agreed.

Transfer.

§ 372. The owner of any product of the mind, or of any representation or expression thereof, may transfer his property in the same.

Effect of publication.

§ 373. If the owner of such product, intentionally makes it public, without securing the privilege afforded to an author or inventor, by act of Congress, a copy or reproduction may be made public by any person, without responsibility to the owner.

§ 374. If the owner does not make it public, any other person subsequently and originally producing the same thing, has the same right therein, which is exclusive to the same extent, as against all persons except the prior author, or those claiming under him. Subsequent inventor, author, &c.

§ 375. Letters, and other private communications in writing, belong to the person to whom they are addressed and delivered; but they cannot be published against the will of the writer, except by authority of law. Private writings.

See Woolsey *a.* Judd, 4 *Duer*, 389 and cases there cited; Eyre *a.* Higbee, 22 *How. Pr.*, 198.

## CHAPTER V.

### OTHER KINDS OF PERSONAL PROPERTY.

SECTION 376. Trade-marks and signs.
377. Good-will of business.
378. Title deeds.

§ 376. One who produces or deals in[1] a thing, or conducts a business,[2] may appropriate to his exclusive use, as a trade-mark, any form, symbol or name, which has not been so appropriated by another, to designate the origin or ownership thereof; but he cannot exclusively appropriate any designation or part of a designation, which relates only to the name, quality or description of the thing or business.[3] Trade-marks and signs.

[1] Taylor *a.* Carpenter, 2 *Sandf. Ch.*, 603.
[2] Howard *a.* Henriques, 3 *Sandf.*, 725.
[3] Amoskeag Manufacturing Co. *a.* Spear, 2 *Sandf.*, 599; Fetridge *a.* Wells, 4 *Abbott's Pr.*, 144.

§ 377. The good-will of a business is the value of the expectation of continued public patronage. This good will passes on a sale of the establishment, unless otherwise agreed. Good-will of business.

§ 378. Instruments essential to the title of real property, and which are not kept in a public office as a record pursuant to law, belong to the person in whom, for the time being, such title may be vested, and pass with the title. Title deeds.

# PART IV.

## ACQUISITION OF PROPERTY.

TITLE I. Modes in which property may be acquired.
II. Occupancy.
III. Accession.
IV. Transfers.
V. Wills.
VI. Succession.

## TITLE I.

### MODES IN WHICH PROPERTY MAY BE ACQUIRED.

§ 379. Property is acquired by

1. Occupancy;
2. Accession;
3. Transfer;
4. Will; or
5. Succession.

## TITLE II.

### OCCUPANCY.

SECTION 380. Occupancy confers title.
381. Prescription.

§ 380. Occupancy for any period confers a title good against all except those who have title by accession, transfer, will or succession. Occupancy confers title.

§ 381. Occupancy for the period prescribed by the CODE OF CIVIL PROCEDURE as sufficient to bar an action for the recovery of the property, confers a title thereto, denominated a title by prescription, which is good against all. Prescription.

# TITLE III.

## ACCESSION.

CHAPTER I. To real property.
II. To personal property.

## CHAPTER I.

### ACCESSION TO REAL PROPERTY.

SECTION 382. Fixtures.
383. Alluvion.
384. Sudden removal of bank.
385. Islands, in navigable streams.
386. In unnavigable streams.
387. Islands formed by division of stream.
388. Ownership of abandoned bed of stream.

Fixtures.

§ 382. When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed belongs to the owner of the land, unless he chooses to require the former to remove it.

Alluvion.

§ 383. Where, by natural causes, land forms in imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material,[1] or by the retiring of the stream,[2] the same belongs to the owner of the bank, subject to any existing rights of way over the bank.

[1] Halsey *a.* McCormick, 18 *N. Y.*, 147.
[2] Code Napoleon, Art. 556, 557.

Sudden removal of bank.

§ 384. If a river or stream, navigable or not navigable, carries away, by sudden violence, a considerable and distinguishable part of a bank, and bears it to a lower or opposite bank, the owner of the part carried away may reclaim his property within a year after the proprietor of the land to which the part carried away has been united, takes possession thereof.

This and the four following sections are similar to those of the Code Napoleon, Arts. 559–563.

§ 385. Islands, and accumulations of mud, formed in the bed of rivers or streams which are navigable, belong to the state, if there is no title or prescription to the contrary. Islands, in navigable streams.

§ 386. Islands and accumulations of mud formed in rivers and streams which are not navigable belong to the owner of the shore on that side where the island is formed; if the island is not formed on one side only, it belongs to the owners of the shore on the two sides, divided by an imaginary line drawn through the middle of the river. In unnavigable streams.

§ 387. If a river or stream, navigable or not navigable, in forming itself a new arm, divides itself and surrounds lands belonging to the owner of the shore, and thereby forms an island, such owner retains the ownership of his land. Islands formed by division of stream.

§ 388. If a river or stream, navigable or not navigable, forms a new course, abandoning its ancient bed, the owners of the land newly occupied take, by way of indemnity, the ancient bed abandoned, each in proportion to the land of which he has been deprived. Ownership of abandoned bed of stream.

## CHAPTER II.

### ACCESSION TO PERSONAL PROPERTY.

The provisions of this chapter, except § 157, are similar to those of the Code Napoleon and the Code of Louisiana.

SECTION 389. Accession by uniting several things.
390. Uniting materials and workmanship.
391. Separable materials.
392. Materials of several owners.
393. Willful trespassers.
394. Owner may elect between the thing and its value.
395. Wrong doer liable in damages and criminally.

§ 389. When things of different owners, which have been united so as to form a whole, are of a nature to be separated again, the whole belongs to the owner of the thing which forms the principal part, and he must reimburse the value of the residue to the other owner. Accession by uniting several things.

That part is to be deemed the principal to which the other has been united only for the use, ornament or completion of the former, unless the latter is the more valuable and has been united without the knowledge of its owner, in which case he may require it to be separated and returned to him, although some injury should result to the thing to which it has been united.

If neither can be considered the principal, within the foregoing rule, the more valuable, or, if the values are nearly equal, the more considerable in bulk, is to be deemed the principal part.

**Uniting materials and workmanship.**

§ 390. If one makes a thing from materials belonging to another, the latter may claim the thing on reimbursing the value of the workmanship, unless the value of the workmanship exceeds the value of the thing made, in which case the thing belongs to the maker, on reimbursing the value of the materials.

**Separable materials.**

§ 391. Where a person has made use of materials, which in part belong to him and in part to another, in order to form a thing of a new description, without having destroyed any of the materials, but in such a way that they cannot be separated without inconvenience, the thing formed is common to both proprietors; in proportion, as respects the one, of the materials belonging to him, and as respects the other, of the materials belonging to him, and the price of his workmanship.

**Materials of several owners.**

§ 392. When a thing has been formed by the admixture of several materials of different owners, and neither can be considered the principal substance, if the materials can be separated, the owner without whose consent the admixture was made, may require a separation. If they cannot be separated without inconvenience, the owners acquire the thing in common, in proportion to the quantity, quality, and value of their materials.

If the materials of one were far superior to the others, both in quantity and value, such one may claim the thing on reimbursing to the others the value of their materials.

§ 393. The foregoing sections of this article do not apply where a person willfully uses the materials of another without his consent; but, in such case, the product belongs to the owner of the material, if its identity can be traced.

Willful trespassers.

Silsbury *a.* McCoon, 3 *N. Y.*, 379.

§ 394. In all cases where a proprietor whose material has been used without his knowledge, in order to form a product of a different description, can claim a property in such product, he has the election of demanding restitution of his material, in kind, in the same quantity, weight, measure, and quality, or the value thereof; or where he is entitled to the product, the value thereof in place of the product.

Owner may elect between the thing and its value.

§ 395. Persons who employ materials belonging to others, without their knowledge, may also be held liable in damages, and criminally, in proper cases.

Wrong doer liable in damages and criminally.

# TITLE IV.

## TRANSFERS.

CHAPTER I. Transfers defined.
II. Transfers of real property.
III. Transfers of personal property.
IV. Recording transfers.
V. Fraudulent transfers.

## CHAPTER I.

### TRANSFERS DEFINED.

§ 396. Transfer is an act between living persons, by which one conveys to another the title to property.* It may be in writing, or in certain cases without writing. A transfer by writing is also called a grant or conveyance.

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* The obligations of the parties to a transfer for consideration, or to a contract of hiring, are regulated by the chapter on Sales, on Exchange, and on Hiring. Transfers in trust for the benefit of creditors are regulated by the chapter on Debtor and Creditor.

## CHAPTER II.

### TRANSFERS OF REAL PROPERTY.

SECTION 397. Requisites to convey certain interests in lands.
398. Grants in fee, or of freeholds, how executed; when to take effect.
399. Livery of seisin.
400. Form of grant.
401. Transfer of incidents and appurtenances; rents.
402. Delivery necessary.
403. Delivery to grantee is necessarily absolute.
404. Delivery in escrow.
405. Surrendering or canceling grant.
406. Constructive delivery.
407. Covenants in conveyances.
408. Lineal and collateral warranties.
409. Certain deeds declared grants.
410. All the estate of the grantor passes.
411. No greater estate passes.
412. How far conclusive on purchasers.
413. Conveyances by tenants for life or for years.
414. Attornment by tenant, when unnecessary. Liabilities of tenant.
415. Conveyance of land adversely possessed.

**Requisites to convey certain interests in lands.**

§ 397. No interest in real property, other than a term not exceeding one year, and no trust or power, relating thereto, can be created, transferred, surrendered or declared, except by operation of law, or by a conveyance in writing, subscribed by the party disposing of the same, or by his agent, thereunto authorized by writing.

This section does not affect the power of a testator in the disposition of his real property by will; nor prevent a trust from arising, or being extinguished, by implication or operation of law; nor does it abridge the power of the courts to compel specific performance of agreements in cases of part performance.

1 R. S., 134, §§ 6, 7, 10.

**Grants in fee, or of freeholds, how executed; when to take effect.**

§ 398. Every grant in fee, or of a freehold estate, must be subscribed and sealed by the grantor or his agent; and if not duly acknowledged, previous to its delivery, according to the provisions of chapter IV of this title, its execution must be attested by at least one witness; or if

not so attested, it has no effect as against a subsequent purchaser or incumbrancer, or those claiming under him, until so acknowledged.

1 R. S., 138, § 137; Wood *a.* Chapin, 13 *N. Y.*, 509.
The words "and delivery" are omitted after "execution."

Livery of seisin.

§ 399. The mode of conveying lands by feoffment, with livery of seisin, is abolished.

1 R. S., 738, § 136.

Form of grant.

§ 400. A grant or conveyance of real property may be, in substance, as follows:

"This grant, made the .. day of ....., in the year ....., between A. B., of ....., of the first part, and C. D., of ....., of the second part, witnesseth:

"That the party of the first part hereby grants to the party of the second part, in consideration of ..... dollars, now received, all the real property situated in ... ....., and bounded.....

"Witness the hand and seal of the party of the first part.

"A. B. [SEAL.]"

In England, the following form is prescribed by 8 and 9 *Vic.*, c. 119:

"This indenture, made, &c., in pursuance of an act to facilitate the conveyance of real property, between A. B. and C. D.; witnesseth: that, in consideration of ..... ....., now paid by the said C. D. to the said A. B. (the receipt whereof is hereby by him acknowledged), he, the said A. B., doth grant unto the said C. D., his heirs and assigns forever, all that .....

In witness whereof, the said parties hereto have hereunto set their hands and seals."

Chan. Kent (4 *Com.*, 461) recommends the following:

"I, A. B., in consideration of one dollar to me paid by C. D., grant to him the lot of land [describing it.]

Witness my hand and seal," &c.

A form briefer still was held sufficient in Kentucky. (Chiles *a.* Conley, 2 *Dana*, 23.)

Transfer of incidents and appurtenances.

§ 401. The transfer of land, with its incidents or appurtenances, carries the incidents mentioned in sections 148 and 149.

Rents.

Rents may be transferred, in whole or in part, like any other thing in action, by a transfer of the whole or part of the reversion, or of the rents without the reversion.

Delivery necessary.

§ 402. A grant takes effect, so as to vest the estate or interest intended to be conveyed, only from its delivery.

1 R. S., 738, § 138.

Delivery to grantee is necessarily absolute.

§ 403. A grant cannot be delivered to the grantee conditionally. Delivery to him or his agent is necessarily absolute, and the instrument takes effect thereupon, discharged of any conditions on which the delivery was made.

Worrall *a.* Munn, 5 *N. Y.* (1 *Seld.*), 229.

Delivery in escrow.

§ 404. A grant may be deposited by the grantor with a stranger, to be delivered by him on performance of a condition, and on delivery by the depositary, it will take effect.

Clark *a.* Gifford, 10 *Wend.*, 310.

Surrendering or canceling grant.

§ 405. Redelivering a grant to the grantor, or canceling it, cannot operate to re-transfer the title.

Jackson *a.* Anderson, 4 *Wend.*, 474.
Jackson *a.* Chase, 2 *Johns.*, 84.
Raynor *a.* Wilson, 6 *Hill*, 469.
Nicholson *a.* Halsey, 1 *Johns. Ch.*, 417.

Constructive delivery.

§ 406. Though an instrument be not actually delivered into the possession of the grantee, it is yet to be deemed constructively delivered in the following cases:

1. Where the instrument is by the agreement of the parties at the time of execution, understood to be delivered, and under such circumstances that the grantee is entitled to immediate delivery;[1]

2. Where it is delivered to a stranger for the benefit of the grantee, and his assent is shown or may be presumed;[2]

A voluntary conveyance or settlement takes effect upon its execution, although the grantor retains its possession, unless the contrary intention appears.[3]

[1] Scrugham *a.* Wood, 15 *Wend.*, 545; Roosevelt *a.* Carow, 6 *Barb.*, 190.
[2] Church *a.* Gilman, 15 *Wend.*, 656.
[3] Souverbye *a.* Arden, 1 *Johns. Ch.*, 240; Bunn *a.* Winthrop, 1 *Id.*, 329.

Covenants in conveyances.

§ 407. No covenant is implied in any conveyance of real property, whether it contains special covenants or not.

1 R. S., 738, § 140.

§ 408. Lineal and collateral warranties, with all their incidents, are abolished. The liability of those who acquire the real property of a decedent, by succession or will, is regulated by the CODE OF CIVIL PROCEDURE.

Lineal and collateral warranties.

1 R. S., 739, § 141. See Appendix D.

§ 409. Deeds of bargain and sale, and of lease and release, are deemed grants.

Certain deeds declared grants.

1 R. S., 739, § 142.

§ 410. A grant of real property passes all the estate or interest of the grantor, unless the intent to pass a less estate or interest is expressed or necessarily implied. The term "heirs," or other words of inheritance, are not requisite to create or convey an estate in fee.

All the estate of grantor passes.

1 R. S., 748, § 1. The following sections of this article are from 1 Id., 739, §§ 143–147.

§ 411. No greater estate or interest passes by any grant or conveyance, hereafter executed, than the grantor himself possessed at the delivery of the deed, or could then lawfully convey, except that every grant is conclusive as against the grantor and those claiming from him by succession.

No greater estate passes.

§ 412. Every grant is also conclusive as against subsequent purchasers from such grantor, or from his successors claiming as such, except a subsequent purchaser, in good faith, and for a valuable consideration, who acquires a superior title by a conveyance that is first duly recorded.

How far conclusive on purchasers.

§ 413. A conveyance made by a tenant for life or years, of a greater estate than he possessed or could lawfully convey, does not work a forfeiture of his estate, but passes to the grantee all the title, estate or interest which such tenant could lawfully convey.

Conveyances by tenants for life or for years.

§ 414. When real property is occupied by a tenant, a conveyance thereof, or of the rents or profits, or of any other interest therein, by the landlord of such tenant, is valid without an attornment of such tenant to the grantee; but the payment of rent to such grantor, by his tenant, before notice of the grant, is binding upon the grantee; and

Attornment by tenant, when unnecessary.

Liabilities of tenant.

the tenant is not liable to the grantee for any breach of the condition of the lease, until he has had notice of the grant.

Conveyance of land adversely possessed.

§ 415. Every grant of real property is absolutely void, if at the time of the delivery thereof, such real property is in the actual possession of a person claiming under a title adverse to that of the grantor. But this section does not apply to grants by the state, nor to judicial sales.

Mortgages of lands held adversely are permitted in certain cases, by the chapter on Mortgages.

## CHAPTER III.

### TRANSFERS OF PERSONAL PROPERTY.

This chapter is new.

SECTION 416. When writing necessary.
417. When title passes.
418. Executed agreement.
419. Gifts defined.
420. Gift, how made.
421. Gift in view of death.
422, 423. Revocation of.
424. When treated as a legacy.

When writing necessary.

§ 416. Personal property, other than ships, may be transferred without writing, except in the cases where a writing is required by the chapters on Sales and on Mortgages.

The transfer of title to the whole or part of a ship can only be made by a written instrument, subscribed by the person making the transfer, or his agent; but there may be a valid oral agreement for such transfer, which the courts may enforce.

The provision relating to ships is intended to settle this open question. The uniform language of the authorities is that a bill of sale is the customary and proper mode of transfer.

When title passes.

§ 417. The transfer of title is not complete until the thing sold is identified,[1] separated from other things so far as not to be in any way confounded with them,[2] put in the condition in which the purchaser agreed to take it, and ready for delivery.

[1] McCandlish *a.* Newman, 22 *Penn.*, 460.
[2] Aldridge *a.* Johnson, 7 *C. & B.*, 898.

§ 418. An agreement for the sale of personal property is executed, and the sale is complete, as soon as the vendor has, with the assent of the purchaser,[1] set apart the thing sold for the use of the latter, and given him notice thereof.[2] Executed agreement.

[1] Aldridge *a.* Johnson, 7 *E. & B.*, 885, 900; Johnson *a.* Hunt, 11 *Wend.*, 138.

[2] See Andrews *a.* Durant, 11 *N. Y.*, 40; Rohde *v.* Thwaites, 6 *B. & C.*, 388; see Wood *a.* Bell, 5 *E. & B.*, 772; Reid *a.* Fairbanks, 13 *C. & B.*, 692.

§ 419. A gift is a transfer of property made voluntarily, and without consideration. Gifts defined.

The obligations of the giver may not be made the subject of a gift.

Pearson *a.* Pearson, 7 *Johns.*, 26; Harris *a.* Clark, 2 *N. Y.*, 93.

§ 420. In cases in which a writing is not made essential to a transfer, a gift may be verbal; but in such cases, if the thing given is capable of delivery, there must be actual or symbolical delivery in order to render the gift valid. In all cases the means of obtaining possession and control must be given. Gift, how made.

Noble *a.* Smith, 2 *Johns.*, 52; Woodruff, *a.* Cook, 25 *Barb.*, 505, and see 2 *Sandf. Ch.*, 400, and cases cited.

§ 421. Where a person, being in contemplation, fear or peril of death, gives personal property to another, to be his only in case the giver should die, and accompanies such gift with actual or symbolical delivery, requiring no further act of the giver to transfer the legal title, the gift is effectual if the giver die. Written evidence of such gift is not necessary, but it must be established by the evidence of two witnesses other than the claimant. Gift in view of death.

§ 422. A gift in view of death does not take effect, if the giver recovers or escapes from the peril, or revokes the gift. Revocation of.

§ 423. A gift in view of death is not affected by a previous will; nor by a subsequent will unless it expresses an intention to revoke the same.

§ 424. A gift in view of death, so far as relates only to the creditors of the giver, must be treated as a legacy. When treated as a legacy.

## CHAPTER IV.

### RECORDING TRANSFERS.*

SECTION 425. Conveyances to be recorded.
426. Powers of attorney, and contracts for land, how proved and recorded.
427. Letter recorded, how revoked.
428. Certain leases in counties named not affected.
429. Other instruments than deeds.
430. Books of record.
431. Who may take acknowledgments.
432. Requisites for acknowledgments.
433. Requisites for acknowledgments when made by married women in this state.
434. Married women residing out of this state.
435. Proof by subscribing witness.
436. Proof of deed when witnesses are dead.
437. What proof to be made, how certified.
438. When deed to be recorded.
439. Effect of recording and deposit.
440. Powers of attorney by married women out of the state.
441. Transfers of personal property, &c.

Conveyances to be recorded.

§ 425. A conveyance of real property, excepting leaseholds for a term not exceeding three years, must be recorded with the register of deeds, or, if none, then with the clerk, of the county where the property is situated. If not so recorded, it is void as against any subsequent purchaser (including an assignee of a mortgage, lease or other conditional estate), in good faith and for a valuable consideration, of the same property, or any part thereof, whose conveyance is first duly recorded.

The term "conveyance," as used in this section embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged or assigned, or by which the title to any real property may be affected; except wills, leases for a term not exceeding three years, and executory contracts for the sale or purchase of real property, and powers of attorney.

1 R. S., 756, §§ 1, 36–38.

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* The provisions for punishment of officers violating the directions of the statute in respect to acknowledgments and recording are omitted here, to be inserted in the PENAL CODE.

§ 426. The preceding section does not apply to a letter of attorney, or other instrument containing a power to convey real property as agent or attorney for the owner thereof; but every such letter or instrument, and every executory contract for the sale or purchase of real property, when proved or acknowledged in the manner prescribed in this chapter, may be recorded in the same manner; and when so proved or acknowledged, and the record thereof when recorded, or the transcript of such record, may be read in evidence, in the same manner and with the like effect as a conveyance recorded in such county.

**Powers of attorney, and contracts for land, how proved and recorded.**

§ 427. No letter or other instrument so recorded is to be deemed revoked by any act of the party by whom it was executed, unless the instrument containing such revocation is also recorded in the same office in which the instrument containing the power was recorded.

**Letter recorded, how revoked.**

1 R. S., 763, §§ 39, 40.

§ 428. The provisions of this chapter do not extend to leases for life or lives, or for years, in the counties of Albany, Ulster, Sullivan, Herkimer, Dutchess, Columbia, Delaware and Schenectady.

**Certain leases in counties named not affected.**

1 R. S., 763, § 42.

§ 429. Any instrument or judgment, affecting the title to real property may be recorded under this chapter, on being proved or acknowledged, or if it be a record, on being duly exemplified.

**Other instruments than deeds.**

The present statutes authorize wills, letters patent of the State, judgments in partition, &c., to be recorded.

§ 430. Conveyances, absolute in terms, and not intended as mortgages, or as securities in the nature of mortgages, are to be recorded in one set of books, and mortgages and securities in another.

**Books of record.**

2 R. S., 756, § 7.

§ 431. To entitle an instrument to be recorded it must be acknowledged by the person executing the same, or proved by a subscribing witness, before one of the following officers:

**Who may take acknowledgments.**

1. Within the state, before

A judge of a court of record;

A mayor or recorder of a city;

A justice of the peace;

A commissioner of deeds;

A notary public;

From 1 R. S., 756, § 4; Laws of 1840, 187, ch. 238; Laws of 1859, 869, ch. 360.

2. Without the state, but within the United States, before

A judge of the supreme or of a district court of the United States;

A judge of the supreme, superior or circuit court of any state or territory;

The mayor of any city;

A commissioner appointed for the purpose by the government of this state, pursuant to special laws of this state; but the certificate of such a commissioner must be accompanied by the certificate of the secretary of state of this State, attesting the existence of the officer, and the genuineness of his signature; and such commissioner can only act within the city or county in which he resided at the time of his appointment;

1 R. S., 757, § 4, subd. 2; Laws of 1845, 89, ch. 109· Laws of 1850, 582, ch. 270, amended 2 Laws of 1857, 756, ch. 788.

Any officer of the state or territory where the acknowledgment is made, authorized by its laws to take the proof or acknowledgment; but the certificate of such officer must be accompanied by a certificate under the name and official seal of the clerk, register, recorder, or prothonotary, of the county in which such officer resides, or of the county or district court or court of common pleas thereof, specifying that such officer was, at the time of taking such proof or acknowledgment, duly authorized to take the same, and that such clerk, register, recorder or prothonotary, is acquainted with the handwriting of such officer, and believes his signature genuine;

Laws of 1848, ch. 195, as amended by Laws of 1856, ch. 61, § 2.

3. Without the United States, before

A minister plenipotentiary, or minister extraordinary, or *chargé d'affaires*, of the United States, resident and accredited in any foreign country;

A consul of the United States resident in any port or country;

In either of the British American provinces, a judge of the highest court thereof;

In the British islands, before the Mayor of London, or the chief magistrate of any city.

From 1 R. S., 759, § 6; Laws of 1829, 348, ch. 222.

Requisites for acknowledgments.

§ 432. The acknowledgment cannot be taken, unless the officer knows or has satisfactory evidence that the person making such acknowledgment is the individual described in and who executed the instrument.

1 R. S., 758, § 9.

Requisites for acknowledgments when made by married women in this state.

§ 433. The acknowledgment of a married woman to an instrument, purporting to be executed by her, shall not be taken, within this state, unless, in addition to the requisites contained in the preceding section, she acknowledges, on a private examination, apart from her husband, that she executed such instrument freely, and without any fear or compulsion of her husband; nor shall any estate of a married woman pass by a conveyance acknowledged by her within this state unless in compliance with this section.

1 R. S., 758, § 10. Modified by making the requirement apply to acknowledgments taken within the state, instead of to acknowledgments wherever taken, of a married woman residing in the state. The fact of residence is often difficult to ascertain, and the validity of the acknowledgment should not be made to turn upon it. The commissioners recommend, however, that this and the following provision be omitted, and the form of acknowledgment by a married woman be made the same as that by any other person.

Married women residing out of this state.

§ 434. When a married woman joins with her husband in a conveyance of real property, executed without this state, the conveyance has the same effect as if she were sole; and the acknowledgment or proof of the execution

of such conveyance by her, if taken without the state, may be the same as if she were sole.

1 R. S., 758, § 11, modified as above.

Proof by subscribing witness.

§ 435. The proof of the execution of an instrument must be made by a subscribing witness thereto, who must state his own place of residence, and that he knew the person described in and who executed the instrument; and such proof shall not be taken, unless the officer is personally acquainted with such subscribing witness, or has satisfactory evidence that he is the same person who was a subscribing witness to the instrument.

1 R. S., 758, § 12.

Proof of deed when witnesses are dead.

§ 436. Where the witnesses to any instrument which might be recorded, are dead, it may be proved before any officer mentioned in section 431, other than commissioners of deeds, justices of the peace and notaries public.

1 R. S., 761, § 30.

What proof to be made, how certified.

§ 437. The proof of the execution of any instrument in the case mentioned in the last section, must be made by satisfactory evidence of the death of all the witnesses thereto, and of the handwriting of such witnesses, or any one of them, and of the grantor; all which evidence, with the names and places of residence of the witnesses examined before him, must be set forth by the officer taking the same, in his certificate of the proof.

1 R. S., 761, § 31.

When deed to be recorded.

§ 438. An instrument, proved and certified pursuant to the two last sections, may be recorded in the proper office, if the original is at the same time deposited therein to remain for public inspection.

1 R. S., 761, § 32.

Effect of recording and deposit.

§ 439. The recording and deposit of an instrument proved and certified according to the provisions of the three last sections, are constructive notice of the execution of such conveyance, to all purchasers subsequent to such recording; but such proof, recording, or deposit, does not entitle such instrument or the record thereof, or the transcript of such record, to be read in evidence.

1 R. S., 761, § 33.

§ 440. When a married woman joins with her husband in executing, without this state, a power of attorney for the conveyance of real property, the conveyance executed in virtue of such power, has the same force and effect as if executed by such married woman in her own proper person; the execution of such power of attorney by her, being first duly proved or acknowledged.

Powers of attorney by married women out of the state.

1 R. S., 763, § 47, modified as § 433 above.

§ 441. Transfers of property in trust for the benefit of creditors, and transfers of personal property, by way of mortgage, are required to be recorded in the cases specified in the chapters on Debtor and Creditor, and on Mortgages, respectively.

Transfers of personal property, &c.

Transfers and mortgages of ships are required, by the act of Congress of 1850, to be recorded in the custom-house where the ship is registered or enrolled.

In other cases transfers of personal property need not be recorded.

## CHAPTER V.

### FRAUDULENT TRANSFERS.

SECTION 442. Certain transfers of and charges upon lands, void for fraud.
443. Conveyances with power of revocation, void, &c.
444. Conveyances by one authorized to revoke former grants.
445. Conveyance before power vests.
446. Transfers of personal property, in trust for grantor, void.
447. Specific performance.

§ 442. Every instrument in writing, except wills, affecting real property, or any estate or interest whatever therein, and every charge upon real property or its rents and profits, made with the intent to defraud prior or subsequent purchasers, for a valuable consideration, of the same lands, rents or profits, is void as against such purchasers, and those claiming under them.

Certain transfers of and charges upon lands, void for fraud.

No such instrument or charge is to be deemed fraudulent, in favor of a subsequent purchaser, who has actual or legal notice thereof, at the time of his purchase, unless the

grantee in such conveyance, or person to be benefited by such charge, was privy to the fraud intended.

2 R. S., 134, §§ 1, 2; 137, §§ 3, 6, 7.

Conveyances with power of revocation void, &c.

§ 443. Every conveyance or charge of, or upon, any estate or interest in real property, containing any provision for the revocation, determination or alteration, of such estate or interest, or any part thereof, at the will of the grantor, is void, as against a subsequent purchaser, and those claiming under him, from such grantor, for a valuable consideration, of any estate or interest so liable to be revoked or determined, although the same be not expressly revoked, determined or altered by such grantor, by virtue of the power reserved or expressed in such prior conveyance or charge.

2 R. S., 134, § 3.

Conveyances by one authorized to revoke former grants.

§ 444. Where a power to revoke a conveyance of real property, or the rents and profits thereof, and to reconvey the same, is given to any person, other than the grantor in such conveyance, and such person thereafter conveys the same property, rents or profits to a purchaser for a valuable consideration, such subsequent conveyance is valid, in the same manner and to the same extent, as if the power of revocation were recited therein, and the intent to revoke the former conveyance expressly declared.

2 R. S., 134, § 4.

Conveyance before power vests.

§ 445. If a conveyance to a purchaser, under either of the two last sections, is made, before the person making the same, is entitled to execute his power of revocation, it is nevertheless valid, from the time the power of revocation actually vests in such person, in the same manner and to the same extent, as if then made.

2 R. S., 134, § 5.

Transfers of personal property, in trust for grantor, void.

§ 446. All deeds of gift, all conveyances, and all transfers, or assignments, verbal or written, of any personal property, made in trust for the use of the person making the same, are void as against the creditors, existing or subsequent, of such person, and those claiming under such creditors.

2 R. S., 135, § 1.

§ 447. The provisions of this article do not abridge the powers of courts to compel the specific performance of agreements, in cases of part performance of such agreements; nor is the title of a purchaser, for value, impaired, unless it appears that he had previous notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor. Specific performance.

2 R. S., 135, § 10; 137, § 5.

# TITLE V.

## WILLS.

In this title, taken, for the most part, from the existing law, are inserted many new provisions relating to nuncupative wills; mutual and conditional wills; partial and total revocation; revocation of will executed in duplicate; effect of alteration or obliteration; wills procured by undue influence; republication by codicil; placing power to devise real property on the same footing as personal estate; the execution of wills in foreign countries; the law of domicil; the interpretation of wills; the payment and abatement of legacies.

CHAPTER I. Execution and revocation of wills.
II. Interpretation of wills, and effect of various provisons.
III. General provisions relating to wills.

## CHAPTER I.

### EXECUTION AND REVOCATION OF WILLS.

SECTION 448. Who may make wills.
449. Monomaniac incompetent.
450. Will procured by fraud, &c.
451. What may pass by wills.
452. Who may take by wills.
453. Nuncupative wills.
454. Mutual wills.
455. Conditional wills.
456. Written wills, how to be executed.
457. Nuncupative wills, how to be executed.
458. Witnesses to add residence.
459. Republication by codicil.
460. Will made out of this state.
461. Subsequent change of domicil.
462. Wills may be deposited for safe keeping.

SECTION 463. Such to be sealed up.
464. To whom to be delivered.
465. When to be opened.
466. Lost or destroyed wills.
467. Written wills, how revoked.
468. Revocation by obliteration on face of will.
469. Revocation of one duplicate.
470. Revocation by subsequent will.
471. Revocation of subsequent will does not revive a former.
472. Revocation by marriage and birth of issue.
473. Revocation of woman's will by marriage.
474. Contract of sale not a revocation.
475. Charge or incumbrance not a revocation.
476. Conveyance when a revocation.
477. Revocation of codicils.
478. Afterborn children, unprovided for, to succeed.
479. Devises and bequests in certain cases not to lapse.
480. Witness to will, cannot take under will.
481. When witness may succeed.
482. Creditor a competent witness.

**Who may make wills.**

§ 448. Every male person of the age of eighteen years or upwards, and every female of the age of sixteen years or upwards, of sound mind or memory, and no others, may devise real property and bequeath personal property by a will duly executed, according to the provisions of this Code.

From 2 R. S., 56, § 1; 60, § 21.

**Monomaniac incompetent.**

§ 449. A person having any insane delusion, is wholly incompetent to make a will.

**Will procured by fraud, &c.**

§ 450. A will or part of a will procured to be made by coercion, restraint, fraud or undue influence, may be denied probate; and a revocation, procured by the same means, may be declared invalid.

This section is new.

**What may pass by wills.**

§ 451. Every estate and interest in real or personal property, to which heirs, husband, widow or next of kin might succeed, may be so devised and bequeathed.

From 2 R. S., 57, § 2.

**Who may take by wills.**

§ 452. Devises and bequests may be made to any person capable by law of taking the property devised or bequeathed, except that no corporation can take by devise or bequest, unless expressly authorized by its charter or by statute so to take.

2 R. S., 57, § 3.

§ 453. A nuncupative will of real or personal property, or both, is valid, when made in contemplation, fear or peril of death, by a soldier, whether he be an officer or private, or a surgeon, or a servant of the army, while in actual military service; or by a sailor, whether he be an officer or surgeon, a mariner or marine, or a servant of the vessel, after he finally goes on board the vessel for the voyage, and before he comes on shore, in port, after the voyage is over. Nuncupative wills.

Modified from 2 R. S., 60, § 22. By this section the nuncupative will may pass real as well as personal property; but it can be made only in contemplation, fear or peril of death.

§ 454. A conjoint or mutual will is valid, but it may be revoked as any other will. Mutual wills.

§ 455. A will, the validity of which is made by its own terms conditional, may be denied probate, according to the event, contingency or condition. Conditional wills.

This and the preceding section are new.

§ 456. Every will except nuncupative wills authorized by section 453, must be executed and attested as follows: Written wills, how to be executed.

1. It must be subscribed at the end thereof, by the testator himself or by some person in his presence and by his direction;

2. The subscription must be so made in the presence of each of the attesting witnesses, or be acknowledged by the testator to have been so made, to each of the attesting witnesses;

3. The testator must at the time of subscribing or acknowledging the same, declare the instrument to be his will;

4. There must be two attesting witnesses, each of whom must sign his name as a witness at the end of the will, at the testator's request.

From 2 R. S., 63, § 40.

§ 457. The nuncupative will is not required to be in writing, nor declared or attested with any formalities. Nuncupative wills, how to be executed.

Witnesses to add residence.

§ 458. A witness of a written will, must write, with his name, his place of residence; and a person who subscribes the testator's name by his direction, must write his own name as a witness to the will.

A violation of this section does not affect the validity of the will.

From 2 R. S., 64, § 41.

Republication by codicil.

§ 459. Executing a codicil, referring to a previous will, has the effect to republish the will, as modified by the codicil.

Will made out of this state.

§ 460. A will of real or personal property, or both, or a revocation thereof, made out of this state by a person not having his domicil in this state, is valid when executed according to the laws of the place in which the same was made, or in which the testator was domiciled at the time, as if it was made in this state and according to the provisions of this article. But no such will or revocation is valid unless executed either according to the provisions of this article or according to the laws of the place in which it was made, or in which the testator was domiciled at the time.

Subsequent change of domicil.

§ 461. Whenever a will or a revocation thereof is duly executed according to the laws of the place in which the same was made, or in which the testator was domiciled at the time, the same is regulated, as to the validity of its execution, by the law of such place, notwithstanding the testator subsequently changed his domicil to a place, by the laws of which such will would be invalid.

This and the preceding section are new.

Wills may be deposited for safe keeping.

§ 462. Each surrogate, county clerk and register of deeds must deposit, in his office, any will delivered to them for that purpose, and give a written receipt to the depositor.

2 R. S., 404, § 67.

To be sealed up, &c.

§ 463. Such will must be inclosed in a sealed wrapper, so that it cannot be read, and the name of the testator, his residence, and the date of the deposit must be indorsed; and it must not be opened until delivered to a person entitled, as hereinafter directed.

2 R. S., 405, § 68.

§ 464. Such will must be delivered only:

To whom to be delivered.

1. To the testator in person;

2. Upon his written order, duly proved by the oath of a subscribing witness;

3. After his death, to the persons named in the indorsement on the wrapper of such will, if any;

4. If there is no such indorsement, and if the will was not deposited with the surrogate having jurisdiction of its probate, then to the surrogate who has jurisdiction.

2 R. S. 405, § 69.

§ 465. The surrogate must, after the death of the testator, publicly open and examine the will and file it in his office, there to remain until duly proved, or must deliver it to the surrogate having jurisdiction of its probate.

Will, when to be opened by surrogate.

2 R. S., 405, § 70.

§ 466. A lost or destroyed will of real or personal property, or both, may be established in the cases provided in section of the Code of Civil Procedure.

Lost or destroyed wills.

The reference is to section 12 of Appendix D.

§ 467. No written will, except in the cases in this chapter mentioned, nor any part thereof, can be revoked or altered, otherwise than by a written will, or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator; or unless such will be burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by some person in his presence and by his direction; and when so done by another person, the direction of the testator, and the fact of such injury or destruction must be proved by two witnesses.

Written wills, how revoked.

2 R. S., 64, § 42.

§ 468. A revocation by obliteration on the face of the will, may be partial or total, and is complete if the material part be obliterated so as to show an intention to revoke. But where the testator attempts to revoke, by altering or obliterating on the face of the will, any provision thereof, in order to effect a new disposition, such revocation is not valid unless such new disposition is legally effected.

Revocation by obliteration on face of will.

Revocation of one duplicate.

§ 469. The revocation of a will, executed in duplicate, may be made by revoking one of the duplicates.

Revocation by subsequent will.

§ 470. A prior will is not revoked by a subsequent will unless the latter contains:

1. An express revocation; or

2. Provisions wholly inconsistent with the terms of the former; but if its provisions are not wholly inconsistent the former remains effectual so far as consistent with the provisions of the subsequent will.

Revocation of subsequent will does not revive the first.

§ 471. If after making a will the testator duly makes and executes a subsequent will, the destruction, canceling or revocation of the latter does not revive the former, unless it appears by the terms of such revocation that it was his intention to revive the prior will, or unless after such destruction, canceling or revocation he duly republishes the prior will.

2 R. S., 65, § 53.

Revocation by marriage and birth of issue.

§ 472. If a man having made a will marries and has issue of such marriage, born either in his lifetime or after his death, and the wife or issue survives him, the will is to be deemed revoked, unless provision has been made for such issue by some settlement, or unless such issue are provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation can be received.

2 R. S., 64, § 43.

Revocation of woman's will by marriage.

§ 473. A will executed by an unmarried woman is revoked by her subsequent marriage.

2 R. S., 64, § 44.

Contract of sale not a revocation.

§ 474. An obligation made by a testator, for value, to transfer property disposed of by a previously made will, is not a revocation of such disposal; but the property passes by the will, subject to the same remedies on the testator's obligation, for a specific performance or otherwise, against the devisees or legatees, as might be had against the testator's successors, if the same had passed by succession.

2 R. S., 64, § 45.

§ 475. A charge or incumbrance upon any real or personal property, for the purpose of securing the payment of money or the performance of any obligation, is not a revocation of any will relating to the same property previously executed; but the devises and bequests of the will take effect subject thereto.

Charge or incumbrance not a revocation.

2 R. S., 64, § 46.

§ 476. A conveyance, settlement, deed, or other act of a testator, by which his property in a thing previously devised or bequeathed by him, is altered but not wholly divested, is not a revocation; but the devise or bequest passes the property which would otherwise devolve by succession. But if the instrument by which such alteration is made, expresses an intent that it shall be a revocation, or if it contains provisions wholly inconsistent with the terms and nature of such previous devise or bequest, such instrument operates as a revocation thereof, unless such inconsistent provisions depend on a condition or contingency, by reason of which they do not take effect.

Conveyance, when not a revocation.

When it is a revocation.

2 R. S., 65, §§ 47, 48.

§ 477. The revocation of a will revokes all its codicils.

Revocation of codicils.

§ 478. Whenever a testator has a child born after the making of his will, either in his lifetime or after his death, and dies leaving such child unprovided for by any settlement, and neither provided for nor in any way mentioned in his will, the child succeeds to the same portion of the testator's real and personal property, that he would have succeeded to if the testator had died intestate.

After-born child, unprovided for, to succeed.

2 R. S., 65, § 49.

§ 479. Whenever any real or personal property is devised or bequeathed to a descendant or brother or sister of the testator, and such legatee or devisee dies during the lifetime of the testator, leaving a descendant who survives the testator, such devise or legacy does not lapse, but the thing devised or bequeathed vests in the surviving descendants of the legatee or devisee, as if such legatee or devisee had survived the testator and had died intestate.

Devises and bequests, in certain cases not to lapse.

2 R. S., 66, § 52.

Witness to will cannot take under will.

§ 480. If a person is a subscribing witness to the execution of a will wherein any beneficial devise, legacy, interest or power of appointment of any real or personal property, is made to such witness, and the will cannot be proved without his testimony, the devise, legacy, interest or power is void so far only as concerns such witness, or any claiming under him, and the witness is competent to prove the execution of the will.

Modified from 2 R. S., 65, § 50; omitting the disqualification of husband or wife of witness.

When witness may succeed.

§ 481. If such witness, would have been entitled to any share of the testator's estate in case the will was not established, then he succeeds to the same portion of the testator's estate, that he would have succeeded to if the testator had died intestate, not exceeding the value of the devise or bequest to him in the will.

2 R. S., 65, § 51.

Creditor a competent witness.

§ 482. If by a will, real property is charged with any debt, and the creditor whose debt is so charged, attests the execution thereof, such creditor, notwithstanding the charge, is a competent witness, to prove the execution of the will.

1 R. S., 57, § 6.

## CHAPTER II.

### INTERPRETATION OF WILLS, AND EFFECT OF VARIOUS PROVISIONS.

SECTION 483. Testator's intention to be carried out.
484. Rules of interpretation.
1. Several instruments are to be taken together.
2. Harmonizing various parts.
3. When a devise or bequest is not controlled by subsequent words.
4. Words capable of two senses.
5. Effect of technical words.
6. Technical words not necessary.
7. Certain words not necessary to pass a fee.
8. Power to devise, how executed by terms of will.
9. Devise or bequest of all real or all personal property, or both.
10 and 11. Residuary clause.
12. "Heirs," "relatives," "issue," "descendants," &c.

13. Words of purchase and of limitation.
14. Time of death.
15. Time of conversion.
16. Devise or bequest to a class.
17. Time of birth of child.
18. Mistakes and omissions corrected.
19. When devises and bequests vest.
20. When cannot be divested.
21. Death of devisee or legatee.
22. Interests in remainder are not affected.
23. Conditional devises and legacies.
24. Conditions precedent.
25. Conditions subsequent.
26. Legatees take as tenants in common.
27. Advancements when ademptions.
SECTION 485. Nature and designations of legacies.
1. Specific.
2. Demonstrative.
3. Annuities.
4. Residuary
5. General.
486. Order of sale in case of an intestate.
487. Order of sale in case of a testator.
488. Legacies, how charged with debts.
489. Abatement.
490. Specific devises and legacies.
491. Heir's conveyance good, unless will is proved within four years.
492. Possession of legatees.
493. Bequest of interest.
494. Satisfaction.
495. Legacies, when due.
496. Interest.
497. Construction of these rules.
498. Executor according to the tenor.
499. Power to appoint is invalid.
500. Executor not to act till qualified.
501. Executor of an executor.

**Testator's intention to be carried out.**

§ 483. A will is to be construed according to the intention of the testator. Where the intention cannot operate to its full extent, it must have effect as far as possible.

**Rules of interpretation.**

§ 484. In interpreting wills, according to the law of this state, the following rules are to be observed unless an intention to the contrary clearly appears:

**Several instruments to be taken together.**

1. Several testamentary instruments are to be taken and construed together as one instrument;

**Harmonizing various parts.**

2. All the parts of a will are to be construed in relation to each other, and so as if possible to form one consistent

whole; but where several parts are absolutely irreconcilable, the latter must prevail;

When a devise or bequest is not controlled by subsequent words.

3. An express and positive devise or bequest cannot be controlled by the reason assigned, or by subsequent ambiguous words, or by inference and argument from other parts of the will; and such a devise or bequest is not affected by a subsequent inaccurate recital of or reference to its contents; though recourse may be had to such reference to assist the construction in case of ambiguity or doubt;

Words capable of two senses.

4. Words, in general, are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another can be collected, and that other can be ascertained; and they are in all cases to receive a construction which will give to every expression some effect, rather than one which will render any of the expressions inoperative; and of two modes of construction that is to be preferred which will prevent a total intestacy;

Effect of technical words.

5. Where a testator uses technical words they are to be taken in their legal sense, unless the context clearly indicates a contrary intention;

Technical words not necessary.

6. Technical words are not necessary to give effect to any species of disposition in a will;

Certain words not necessary to pass a fee.

7. The term "heirs" or other words of inheritance are not requisite to create or convey an estate in fee; and a devise of real property passes all the estate or interest of the testator, unless otherwise limited;

1 R. S., 748, § 1.

Power to devise, how executed by terms of will.

8. Real property, embraced in a power to devise, passes by a will purporting to devise all the real property of the testator;

1 R. S., 737, § 126.

Devise or bequest of all real or all personal property or both.

9. A devise or bequest of all the testator's real or personal property, in express terms, or in any other terms denoting his intent to devise all his real or personal property, passes all the real or personal property which he was entitled to devise or bequeath at the time of his death;

Residuary clause.

10. A devise of the residue of the testator's estate, property, or real property, passes all the real property which

he was entitled to devise at the time of his death, not otherwise effectually devised by his will;

11. A bequest of the residue of the testator's estate, property, or personal property, passes all the personal property which he was entitled to bequeath at the time of his death, not otherwise effectually bequeathed by his will; **Residuary clause.**

12. Devises and bequests to "heirs," "relations," "nearest relations," "representatives," "legal representatives" or "personal representatives," or "family," "issue," "descendants," "nearest" or "next of kin," of any person without other words of qualification, and when the terms are used as words of purchase and not of limitation, vest the property,* in those who would be entitled to succeed to the property of such person, according to sections 510 and 511, of this Code; **"Heirs," "relatives," "issue," "descendants," &c.**

13. The terms mentioned in the preceding subdivision are used as words of purchase and not of limitation, when the property is given to the person so designated, directly, and not as a qualification of an estate given to the ancestor of such person; **Words of purchase and of limitation.**

14. Words referring to death or survivorship, simply, relate to the time of the testator's death, unless possession is postponed, when they must be referred to the time of possession; **Time of death.**

15. When the testator directs the conversion of his real property into money, such property and all its proceeds must be deemed personal property, from the time of his death; **Time of conversion.**

16. A devise or bequest to a class includes every person answering the description at the testator's death; but when the possession is postponed to a future period it includes also all persons coming within the description before the time to which possession is postponed; **Devise or bequest to a class.**

17. A child begotten before, but not born till after, the testator's death, or any other period when a devise or **Time of birth of child.**

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*If the provisions of Appendix A are substituted for those of title VI below, the following words should be substituted for the words following the asterisk in subdivision 12. "If real, in those who would be entitled to succeed to the property of such person according to the article on Succession to Real Property; if personal, then in those who would be entitled according to the article on Succession to Personal Property."

bequest to a class vests in right or in possession, takes, if answering the description of the class;

**Mistakes and omissions.**

18. When, applying the will, it is found that there is an imperfect description, or that no person or property exactly answers the description, mistakes and omissions must be corrected if the error appears from the context of the will or from parol evidence; but evidence of the declarations of the testator as to his intention cannot be received;

**When devises and bequests vest.**

19. Devises and bequests, including devises and bequests to a person on attaining majority, vest at the testator's death;

**When cannot be divested.**

20. A devise or bequest, when vested, cannot be divested unless upon the occurrence of the precise contingency prescribed by the testator for that purpose;

**Death of devisee or legatee.**

21. If the devisee or legatee dies during the lifetime of the testator, the testamentary disposition fails, unless an intention appears to substitute some other in his place;

**Interests in remainder are not affected.**

22. The death of a devisee or legatee, of a limited interest, before the testator's death, does not defeat the interests of persons in remainder, who survive the testator;

**Conditional devises and legacies.**

23. A conditional devise or legacy is one which depends upon the occurrence of some uncertain event, by which it is either to take effect or be defeated. If the condition is to precede the devise or legacy, nothing vests until performance; except where the condition is impossible, in which case it vests, unless the condition was the sole motive of the bequest, and the impossibility was unknown to the testator, or arose by an unavoidable event subsequent to the execution of the will;

**Conditions precedent.**

24. Conditions precedent are to be deemed performed, when the intention of the testator has been substantially, though not literally, complied with;

**Conditions subsequent.**

25. A subsequent condition is where an estate or interest is so given as to vest immediately, subject only to be divested by some subsequent act or event;

**Legatees take as tenants in common.**

26. Legacies given to more than one person vest in them as tenants in common;

**Advancements when ademptions**

27. Advancements or gifts are not to be taken as ademptions of general legacies, unless such intention is expressed by the testator in writing.

§ 485. Legacies are distinguished and designated, according to their nature, as follows: Nature and designation of legacies.

1. Legacies of a particular thing, specified, and distinguished from all others of the same kind belonging to the testator, are specific. If such legacy fails, resort cannot be had to the other property of the testator; Specific.

2. Legacies are demonstrative when the particular fund or personal property is pointed out from which they are to be taken or paid. If such fund or property fails, in whole or in part, resort may be had to the general assets, as in case of a general legacy; Demonstrative.

3. Annuities are bequests of certain specified sums periodically; if the fund or property out of which they are payable fails, resort may be had to the general assets, as in case of a general legacy; Annuities.

4. A residuary legacy embraces only that which remains after all the bequests of the will are discharged; Residuary

5. All other legacies are general legacies. General.

§ 486. When the decedent died intestate, the property, except such as is otherwise disposed of under section 509 of this Code, and such as is exempt under section[1] of the CODE OF CIVIL PROCEDURE, is to be resorted to, in the following order, in payment of debts: Order of sale in case of an intestate.

1. Personal property;

2. Real property other than estates of freehold;

3. Estates of freehold.

[1] The reference is to section 83 of Appendix D.

§ 487. In the case of a testator, the same is to be resorted to, in the following order, for the payment of debts and legacies: Order of sale in case of a testator.

1. Personal property excepting such as is expressly exempted in the will;

2. Real property expressly devised to pay debts or legacies, where the personal property is exempted in the will, or where the personal property which is not exempted is insufficient;

3. Real property which is not effectually devised;

4. Property, real or personal, charged with debts or

legacies; but though real property be charged with the payment of legacies, the personal property is not to be exonerated;

5. The following property, ratably: real property, devised without being charged with debts or legacies, and specific and demonstrative legacies;

6. Personal property expressly exempted in the will.

Legacies, how charged with debts.

§ 488. In the application of the personal property to the payment of debts, the following order must be observed, unless a different intention is expressed in the will.

1. Residuary legacies;

2. General legacies;

3. Legacies given for a valuable consideration or the relinquishment of dower, or some right or interest;

4. Specific and demonstrative legacies.

Legacies to husband, widow or kindred of any class are chargeable only after legacies to persons not related to the testator.

Abatement.

§ 489. Abatement takes place in any class only as between legacies of that class, unless a different intention is expressed in the will.

Specific devises and legacies.

§ 490. In a specific devise or legacy the title passes by the will, but, in case of legacies, possession can only be obtained from the personal representative; and he may be authorized by the surrogate to sell the property devised or bequeathed, in the cases herein provided.

Heir's conveyance good unless will is proved within four years.

§ 491. The title to real property, of a purchaser in good faith, for a valuable consideration, derived from any person claiming the same by succession, is not impaired by any devise made by the decedent from whom succession is claimed, unless the instrument containing such devise, is duly proved as a will, and recorded in the office of the surrogate having jurisdiction thereof, or unless written notice of such devise is filed with the clerk of the county where the real property is situated, within four years after the devisor's death.

The provisions of the Revised Statutes, (1 R. S., 748, § 3,) from which this section is taken, made the following exceptions to the foregoing rule:

1. Where the devisee shall have been within the age of twenty-one years, or insane, or imprisoned, or a married woman, or out of the state at the time of the death of such testator; or,

2. Where it shall appear that the will or codicil containing such devise, shall have been concealed by the heirs of such testator, or some one of them.

In which several cases, the limitation contained in this section shall not commence, until after the expiration of one year from the time when such disability shall have been removed, or such will or codicil shall have been delivered to the devisee, or his representative, or to the proper surrogate."

These disabilities are such as almost to destroy the value of the provision, and the commissioners have therefore omitted them. As, however, the probate is often delayed by litigation, a provision that notice may be filed in the office of the county clerk, with equal effect, has been added.

Possession of legatees.

§ 492. Where specific legacies are for life only, the first legatee must sign and deliver to the second legatee, or, if there is none, to the personal representative, an inventory of the property, expressing that the same is in his custody for life only, and that, on his decease, it is to be delivered and to remain to the use and for the benefit of the second legatee or to the personal representative, as the case may be.

The following sections are new.

Bequest of interest.

§ 493. In case of a bequest of the interest or income of a certain sum or fund, the interest accrues from the testator's death.

Satisfaction.

§ 494. A legacy or a gift in contemplation, fear or peril of death may be satisfied.

Legacies when due.

§ 495. Legacies are due and deliverable, at the expiration of one year after the testator's decease. Annuities commence at the testator's decease.

Interest.

§ 496. Legacies bear interest from the time when they are due and payable, except that legacies for maintenance, or to the testator's widow, bear interest from the testator's decease.

Construction of these rules.

§ 497. The four preceding sections are in all cases to be controlled by the testator's express intention.

Executor according to the tenor.

§ 498. Where it appears, by the terms of the will, that it was the intention of the testator to commit the execution thereof and the administration of his estate to any person as executor, such person, although not named executor, is entitled to letters testamentary in like manner as if he had been named executor.

Power to appoint is invalid.

§ 499. An authority to an executor to appoint an executor is invalid.

Executor not to act till qualified

§ 500. No person has any power, as an executor, until he qualifies, except that before letters have been issued, he may pay funeral charges and take necessary measures for the preservation of the estate.

From 2 R. S., 71, §§ 15, 16.

Executor of an executor.

§ 501. No executor of an executor, as such, has any power over the estate of the first testator.

2 R. S., 71, § 17; 448, § 11.

## CHAPTER III.

### GENERAL PROVISIONS.

SECTION 502. Provisions as to revocations.
503. Execution and construction of prior wills not affected.
504. "Wills" includes codicils.
505. The law of what place applies.
506. Liability of beneficiaries for testator's obligations.

Provisions as to revocations.

§ 502. The provisions of this title in relation to the revocation of wills, apply to all wills made by any testator living at the expiration of one year from the time this article takes effect.

2 R. S., 68, § 76.

Execution and construction of prior wills not affected.

§ 503. The provisions of this title do not impair the validity of the execution of any will made before this article takes effect, or affect the construction of any such will.

2 R. S., 68, § 87.

"Will" includes codicils.

§ 504. The term "will," as used in this Code, includes all codicils as well as wills.

2 R. S., 68, § 77.

§ 505. Except as otherwise provided, the validity and interpretation of wills is governed, when relating to real property within this state, by the laws of this state; when relating to personal property, by the law of the testator's domicil. The law of what place applies.

§ 506. Those to whom property is given by will, are liable for the obligations of the testator in the cases and to the extent prescribed by the Code of Civil Procedure. Liability of beneficiaries for testator's obligations.

See Appendix D, ch. 3.

# TITLE VI.

## SUCCESSION.

NOTE.—The object of the very important change proposed by this title, is to simplify the settlement of estates, and particularly titles to real property, by vesting the whole estate of the decedent in the executors or administrators.

By the existing law the term "real property" as between the heir and the executor, has a very different extent of meaning from the same term in other uses, and doubtless different from that popularly attached to it by testators and others contemplating the provision which their families may require in case of their death.

There seems to be no reason why the property of the landholder should be devolved by law upon one class of persons, while the property of the merchant, who may leave a family situated in the same circumstances, is devolved by law upon another class, or in a different method. For this reason the commissioners recommend one method of distribution for both real and personal property, and for this purpose have followed substantially the method the law now pursues in respect to personal property.

In case it is not thought best to adopt this change, the provisions of another chapter upon this subject, contained in Appendix A, at the end of this report, will be found to present the present distinction between real and personal property as between heir and executor, and the statutes of distribution and descent, with some modifications which those rules seem to require.

SECTION 507. Succession defined.
508. Office of personal representatives.
509. Certain personal and other property not assets but retained by family.

SECTION 510. Order of succession to personal property.
1. Husband.
2. Widow and children.
3. Widow and next of kin.
4. Widow alone.
5. Children alone.
511. Where there is neither widow nor children.
512. Relatives in equal degree; in unequal degrees.
513. Several heirs, how to hold.
514. Abolition of dower and curtesy.
515. Certain estates, &c., not to be affected.
516. Trusts.
517. Trust estates vest in the Supreme Court.
518. Succession to real property of a copartnership.
519. When advancement to be set-off or deducted.
520. Relatives of the half blood.
521. Computation of degrees.
522. Aliens.
523. Alienism of relative.
524. Mother, &c., of illegitimate decedent may succeed.
525. Illegitimate child may succeed to mother's property.
526. Illegitimacy.
527. Posthumous relatives.
528. Divorce bars succession between the parties.
529. Who are representatives.
530. Escheat.
531. Liability of successors for decedent's obligations.

**Succession defined.**

§ 507. Succession is the coming in of another to take the property of one who dies without disposing of it by will.

NOTE.—The term "descent," hitherto chiefly used in this state to denote the devolution of an inheritance, was derived from the ancient principle of the English law, that an inheritance could never ascend or pass from son to father, but must descend or pass to descendants. But as the American law allows property to pass in both ways, there arises an incongruity in continuing this use of the term; an incongruity which causes practical embarrassment, since the word "descendants" must still be confined to its strict meaning and cannot embrace all those who may take by our statute of descents, so called, and the word "descend" must often be used in the same view and in contradistinction to the devolution of property in the ascending line. The term "succession" is the more appropriate phrase of the civil law, and this, already in common use among us, the commissioners nave adopted to denote the transmission of the property of a decedent by operation of law.

§ 508. The property, both real and personal, of any one who dies without disposing of it by will, passes to the personal representatives of such person, as trustees: Office of personal representatives.

1. To make the provision for the surviving husband or wife and child, which is directed by section 509;

2. To apply it to the payment of the debts of the decedent, according to the title on Wills and the provisions of the CODE OF CIVIL PROCEDURE;

3. To distribute any remaining property among those entitled to succeed to the property of the decedent, according to the provisions of this title.

The personal representatives of a decedent are his executors or administrators, including administrators with will annexed, who have duly qualified according to the provisions of the CODE OF CIVIL PROCEDURE.

See these provisions in Appendix D.

§ 509. Where the decedent left a husband, widow, or child, the following property is to be transferred and delivered by the personal representative, to such widow, or husband, and child or children, and is not to be deemed assets: Certain personal and other property not assets but retained by family.

1. Any estate or interest, to the value of one thousand dollars, in a lot and buildings thereon, occupied as a residence by the decedent, and which, by law, is exempt, as a homestead, from sale on execution;

2. All sewing machines, spinning wheels, weaving looms, and stoves, used by the family;

3. The family Bible; one pew, family pictures, and school books used by the family; and books, not exceeding in value one hundred dollars, used as part of the family library;

4. Sheep, to the number of ten, with their fleeces, and the yarn and cloth manufactured from the same; two cows, four swine;

5. All wearing apparel and clothing, and the wife's ornaments, proper for her station; all necessary beds, bedsteads and bedding; necessary cooking utensils; three tables, twelve chairs; knives and forks; plates, teacups

and saucers; one sugar-dish, one milkpot, one teapot, one coffeepot, and twelve spoons;

6. All family stores, or provisions, or supplies, for ordinary domestic use;

7. Household furniture, or other personal property, or money, to the value or amount of two hundred and fifty dollars;

8. Letters and other private communications in writing.

Such property is to remain in the possession of the husband or widow, if there is one, during the time such husband or widow and child or children, or two or more survivors of them, reside together. When any one ceases so to reside, he is entitled to receive an equal share, or the value thereof, of such property, except that a widow may retain, as her own, her wearing apparel and her ornaments.

Modified from 2 R. S., 83, §§ 9, 10; Laws of 1850, 499; Laws of 1859, 343. Subdivision 8 is new.

Order of succession to personal property.

§ 510. All property remaining after payment of debts, and, where the decedent left a will, after satisfying also the gifts of the will, is to be distributed, together with any damages recovered by the personal representative for any wrongful act, neglect or default which caused the decedent's death, to the successors of the decedent as follows:

Husband.

1. If the decedent leaves a husband the whole surplus goes to him, notwithstanding it was the separate property of the wife, provided she did not, during the marriage, alienate such property, or effectually dispose of the same on her decease by will or by gift in view of death;

It is held that the Married Woman's Acts of 1848 and 1849, do not affect the question of the succession to property left by a wife on her death. (Ransom *a.* Nichols, 22 *N. Y.*, 110, and see Vallance *a.* Bausch, 28 *Barb.*, 633, and Billings *a.* Baker, 28 *Barb.*, 343, and cases there cited.) The commissioners have therefore declared the rule as above.

Widow and children.

2. If the decedent leaves a widow and lineal descendants, one-third part goes to the widow, and the other two-thirds to the nearest lineal descendants and the successors of those who are deceased;

3. If the decedent leaves a widow and no descendants, nd leaves a father or mother, brother or sister, the whole urplus, if it does not exceed in value at the time of distribution ten thousand dollars, goes to the widow; if it xceeds ten thousand dollars, but does not exceed twenty housand dollars, then ten thousand dollars goes to her; f it exceeds twenty thousand dollars, then one-half goes o her. The remainder, if any, goes to the father and nother or either of them, if any, and if there are none, to he brothers and sisters or either of them; Widow and next of kin.

4. If the decedent leaves a widow and no descendant, arent, brother, or sister, the whole surplus goes to the ridow; Widow alone.

5. If the decedent leaves no widow, the whole surplus oes equally to the nearest lineal descendants and the uccessors of those who are deceased. Children alone.

NOTE.—This and the following section are modified from 2 R. S., 96, § 75, as amended by Laws of 1845, 257, ch. 236.

§ 511. If there is no widow and no descendant, the whole urplus goes to the next of kin, and the successors of those vho are deceased, as follows: Where there is neither widow nor children.

1. To the father or mother, or either of them;

2. If there is no parent, to the brothers and sisters, in qual shares, and the successors of those who are deceased;

3. If there is no parent or brother or sister, or successor f a brother or sister, then to the next of kin and the successors of those who are deceased.

The successors of a deceased parent cannot take by representation in his or her place.

§ 512. Where the successors of the decedent, except ze ents, are all in equal degree of consanguinity to the decedent, heir shares are equal; but if several are of unequal degree, ach of the nearest degree succeeds to the share to which e would have been entitled had all those in the same legree, who have died leaving issue, been living; and the ssue of those who have died, respectively succeed to Relations in equal degree. In unequal degree.

the shares which such descendants or next of kin would have received if living.

From 2 R. S., 97, § 75, subs. 9 and 10.

Several heirs, how to hold.

§ 513. Whenever real property, or a share thereof, vests in several persons under the provisions of this article, they take, as tenants in common, in proportion to their respective rights.

1 R. S., 753, § 17.

Abolition of dower and curtesy.

§ 514. Dower and curtesy are abolished.

NOTE.— The commissioners recommend this change in connection with the provisions proposed under the chapter on Husband and Wife, and with those proposed in relation to the wife's succession to the husband's estate, § 510.

The provisions of the law of 1860 on this subject, are as follows:

At the decease of husband or wife, leaving no minor child or children, the survivor shall hold, possess and enjoy a life estate in one-third of all the real estate of which the husband or wife died seised.

Laws of 1860, 159, ch. 90, § 10.

At the decease of the husband or wife intestate, leaving minor child or children, the survivor shall hold, possess and enjoy all the real estate of which the husband or wife died seised, and all the rents, issues and profits thereof during the minority of the youngest child, and one-third thereof during his or her natural life.

Laws of 1860, 159, ch. 90, § 11.

Certain estates, &c., not to be affected.

§ 515. This chapter does not affect any limitation of any estate by deed or will.

1 R. S., 754, § 20; omitting the reference to Dower and Curtesy.

Trusts.

§ 516. The interest of any person in real property held in trust for him, if not devised by him, vests in his successors, according to the provisions of this chapter.

1 R. S., 754, § 21.

Trust estates vest in supreme court.

§ 517. Upon the death of a sole trustee of an express trust, the trust estate does not devolve by succession, but the trust, if then unexecuted, vests in the Supreme Court, with all the powers and duties of the original trustee, and must be executed by a person appointed for that purpose, under the direction of the court.

1 R. S., 730, § 68.

§ 518. Where partnership assets are invested in real property, and a partner dies, the succession to the same is subject to the adjustment of the partnership affairs.

Succession to real property of a copartnership.

This section is new.

§ 519. When any real or personal property, or both, whether within or without this state, of a person who dies intestate as to all his property, has been advanced by such intestate, directly, or by virtue of a beneficial power, or of a power in trust with a right of selection, to a person entitled to succeed to his property, and in view to a portion or settlement in life, and so expressed in the instrument of settlement or portion, the value thereof as expressed in the instrument must be reckoned, for the purposes of this section only, as part of the property of such intestate which his successors are to receive, and if such advancement equals the amount of the share which such relative would be entitled to receive, of the property so reckoned, then such relative and his successors have no share in the property of the intestate. But if the advancement is less than such share, he and his successors are to have so much only of the property as is sufficient to make it equal to such share. The exclusion from succession, and the adjustment of the shares under these provisions, takes effect only upon judgment in an action in the supreme court

When advancement to be set-off or deducted.

Unless both the purpose and the value of such settlement or portion, are expressed in the instrument of settlement, there is no legal advancement within the provisions of the preceding section.

Modified from 1 R. S., 754, §§ 23, 24, 25; *Id.*, 737, § 127.

NOTE.— The provisions from which this section is taken, although in terms embracing the case of any intestate, apply only in cases of total intestacy. (Thompson *v.* Carmichael, 3 *Sandf. Ch.*, 120.) Questions of considerable embarrassment, which frequently arise in determining what is to be deemed an advancement, and what is to be taken as its value, have led the commissioners to insert the provision, that in order to constitute a settlement an advancement, within these provisions, its purpose and value must be expressed in the instrument.

There seems to be no sufficient reason why the succession should be interrupted or affected until the fact of the existence of the advancement, and its value, have been

finally determined. Under the present provisions, so long as the question whether gifts made by the deceased were advancements or not is undetermined, the question as to who is entitled to succeed, or in what shares they are to take, is also in suspense. We have thought it better, therefore, for the settling of titles, to provide that the succession shall not be affected until a judgment is had, declaring the existence and extent of the advancement.

Relatives of the half blood.

§ 520. Relatives of the half blood, on either the paternal or maternal side, and their descendants, and the successors of both, succeed equally with those of the whole blood, except that to real property, which came to the decedent by succession, devise or gift, of his relative, none who are not in any wise of the blood of such relative, can succeed.

NOTE.—1 R. S., 753, § 15; 2 *id.*, 97, § 75, sub. 10. The modification of the phraseology of the first part of this section is adopted to embrace distinctly, the case of relatives of the half blood on the mother's side, and of the whole blood on the father's, in accordance with the decision in the case of Brown *v.* Burlingham, 5 *Sandf.*, 418.

In McCarthy *v.* Marsh, 1 *Seld.*, 263, it was held that the word "ancestors" as used in section 22 of this chapter of the Revised Statutes, embraced collateral kindred as well as progenitors. Since the word as used in section 15, should doubtless have the same meaning, the commissioners have substituted for it here, as well as in that section, the word "relatives."

The words "of the blood" in the latter part of section 15, include the half blood as well as the whole. Beebee *v.* Griffing, 4 *Kern.*, 235.

Computation of degrees.

§ 521. In determining the succession, degrees of relationship are reckoned by counting from the decedent up to the common ancestor, and then down to the relatives in question; reckoning a degree for each person. In such computation the decedent is excluded, the relative included, and the common ancestor counted but once.

Brother and sisters are in the first degree of relationship, which rule applies for the benefit of their successors.

McGregor *v.* Comstock, 3 *Comst.*, 408.

Aliens.

§ 522. Aliens may take in all cases, by succession, as well as citizens.

NOTE.—This provision is new. See section 132, and note on page 35.

§ 523. No person capable of succeeding under the provisions of this chapter, is precluded from such succession, by reason of the alienism of any relative. Alienism of relative.

From 1 R. S., 754, § 22, and 1 *Seld.*, 263.

§ 524. The mother, and the relatives on the part of the mother, succeed to the property of her illegitimate child as if the child were legitimate. Mother, &c., of illegitimate decedent may succeed.

§ 525. In case of the death of a mother leaving no lawful issue, and no husband, and leaving illegitimate children or their descendants, such children and descendants succeed in the same manner as if such children were legitimate. Illegitimate child may succeed to mother's property.

Laws of 1855, ch. 547.

§ 526. No person can succeed through an illegitimate relationship, except in the cases hereinbefore provided. Illegitimacy.

1 R. S., 754, § 19.

§ 527. Relatives of the decedent, begotten before his death, but born thereafter, succeed, as if born in his lifetime and surviving him. Posthumous relatives.

1 R. S., 754, § 18; 2 *id.*, 97, § 75, subd. 13.

§ 528. In case of divorce dissolving the marriage contract for the misconduct of either party thereto, such party is not entitled to succeed to the property of the other. Divorce bars succession between the parties.

This provision already exists as against the wife, in cases of dower and succession to personal property. 2 R. S., 146, § 48.

§ 529. The successors of a deceased person who would have been entitled, if living, to succeed to the decedent's property, are those who would have been entitled to succeed to the property of such deceased person, if he had been living at the death of the decedent, and had died immediately thereafter. Who are representatives.

§ 530. If there is no one capable of succeeding under the preceding sections, the property devolves to the people of the state. Lands so passing to the state, are, whether held by the state or its grantees, subject to the same charges and trusts to which they would have been subject if they had passed by succession, and the supreme court has power Escheat.

to direct the attorney-general to convey the same to the parties entitled, or to a new trustee appointed by the court.

1 R. S., 718, §§ 1, 2.

Liability of successors for decedent's obligations.

§ 531. Those who succeed to the property of a decedent are liable for his obligations in the cases, and to the extent prescribed by the Code of Civil Procedure.

See Appendix D, chapter 3.

# DIVISION THIRD.

## OBLIGATIONS.

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PART I. Obligations in General.
II. Obligations arising from Particular Transactions.

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## PART I.

### OBLIGATIONS IN GENERAL.

TITLE I. Nature of an Obligation.
II. Contracts.
III. Obligations Imposed by Law.
IV. Extinction of Obligations.

## TITLE I.

### NATURE OF AN OBLIGATION.

SECTION 532. Definition of obligations.
533. How created.

§ 532. An obligation is a legal duty, by which a person is bound to do or not to do a certain thing. **Definition of obligations.**

§ 533. An obligation arises either from **How created.**

1. The contract of the parties; or,
2. The operation of law.

# TITLE II.

## CONTRACTS.

CHAPTER I. Nature of a contract.
II. Manner of creating contracts.
III. Interpretation of contracts.
IV. Effect of contracts.
V. The different species of contracts.

## CHAPTER I.

### NATURE OF A CONTRACT.

ARTICLE I. Definition.
II. Parties.
III. Object.
IV. Consent.
V. Consideration.

## ARTICLE I.

### DEFINITION.

SECTION 534. Definition of contract.
535. Its requisites.

Definition of contract.

§ 534. A contract is an agreement to do or not to do a certain thing.

Its requisites.

§ 535. It is essential to the existence of a contract that there should be

1. Parties capable of contracting;
2. Their consent;
3. A lawful object;
4. A sufficient cause or consideration.

Code La., 1772, 1758, 1759; Code Napoleon, 1108.

## ARTICLE II.

### PARTIES.

SECTION 536. Who may contract.
537. Identification.

§ 536. All persons are capable of contracting, except — Who may contract.

1. Infants, they having only such capacity as is defined by Part I of the First Division of this Code;

2. Persons of unsound mind, they having only such capacity as is defined by the same Part.

3. Persons deprived of civil rights.

§ 537. The parties must not only exist, but it must be possible to identify them, or there is no contract. — Identification.

## ARTICLE III.

### OBJECT OF A CONTRACT.

SECTION 538. Definition of the object.
539. Object to be lawful and possible.
540, 541. Object unlawful.
542, 543. Impossibility of object.
544. Object ascertainable.

§ 538. The object of a contract is the thing which it is agreed to do or not to do. — Definition of the object.

Martin *v.* McCormick, 8 *N. Y.*, 335.

§ 539. The object of a contract must be lawful, possible,[1] and ascertainable.[2] — Object to be lawful and possible.

[1] Code La., 1885, 1886.

[2] Code La., 1880; Richards *v.* Edick, 17 *Barb.*, 260; Abeel *v.* Radcliff, 13 *Johns.*, 300; see Tracy *v.* Albany Exch. Co., 7 *N. Y.*, 474.

§ 540. That is not lawful which is: — Object unlawful.

1. Contrary to an express provision of law;[1]

2. Contrary to the policy of the law, though not expressly prohibited;[1]

3. Otherwise contrary to good morals.[2]

[1] This is without distinction as to *malum prohibitum* and *malum in se*. Pennington *v.* Townsend, 7 *Wend.*, 276; Leavitt *v.* Palmer, 3 *N. Y.*, 19; De Groot *v.* Van Duzer, 20 *Wend.*, 390; Pratt *v.* Adams, 7 *Paige*, 653; Seneca Co. Bk. *v.* Lamb, 26 *Barb.*, 595.

[2] Bell *v.* Leggett, 7 *N. Y.*, 176, 181; Gray *v.* Hook, 4 *N. Y.*, 449.

[3] Lady Cox's Case, 3 *Peere Wms.*, 339; Walker *v.* Perkins, 3 *Burr.*, 1568.

Object unlawful.

§ 541. All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for fraud, wilful injury to the person or property of another, or any violation of law, whether wilful or negligent, are against the policy of the law, and so far void.

Impossibility of object.

§ 542. Everything is deemed possible, except that which is physically impossible.

Id.

§ 543. Impossibility is to be determined, not by the means or ability of the party, but by the nature of things.[1]

[1] Code La., 1885, 2028; see McNeill *v.* Reed, 9 *Bing.*, 68; Beebe *v.* Johnson, 19 *Wend.*, 500; Harmony *v.* Bingham, 12 *N. Y.*, 99.

Object ascertainable.

§ 544. That is deemed ascertainable which is capable of being ascertained by the time the contract is to be performed.

## ARTICLE IV.

### CONSENT.

SECTION 545. Assumption of obligations by acceptance of benefit.
546. Essentials of consent.
547. Consent, when voidable.
548, 549. Apparent consent, procured by duress, menace, fraud, &c.
550. Duress.
551. Menace.
552. Fraud, actual or constructive.
553. Actual fraud.
554. Constructive fraud.

SECTION 555. Actual fraud is a question of fact.
556. Undue influence.
557. Mistake of fact or of law.
558. Mistake of fact.
559. Mistake of law.
560. Mistake of foreign laws.
561. Mistake through wilful ignorance.
562. Mutuality of consent.
563. Communication of consent.
564. Mode of communicating acceptance of proposal.
565. When communication of acceptance concludes contract.
566. Acceptance by performance of conditions.
567. Acceptance must be absolute.
568. Revocation of proposal.
569. Revocation, how made.
570. Ratification of contract void for want of consent.

Assumption of obligation by acceptance of benefits.

§ 545. A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are or ought to be known by the person accepting.[1]

[1] Bennett v. Judson, 21 *N. Y.*, 238.

Essentials of consent.

§ 546. The consent of the parties must be

1. Free;
2. Mutual;
3. Communicated by each to the other.

Consent, when voidable.

§ 547. A consent which is not free or mutual is nevertheless not absolutely void, but voidable only at the option of the party prejudiced or those claiming under him.

Apparent consent procured by duress, menace, fraud, &c.

§ 548. An apparent consent is not real or free when obtained through

1. Duress;
2. Menace;
3. Fraud;
4. Undue influence;
5. Mistake; or,
6. Accident.

Id.

§ 549. Consent is deemed to have been obtained through one of the causes mentioned in the last section only when it would not have been given had such cause not existed.[1]

[1] Bronson v. Wiman, 8 *N. Y.*, 188, 189; Flight v. Booth, 1 *Bing. N. C.*, 376; Code La., 1819; Faure v. Martin, 7 *N. Y.*, 219.

Duress, what.

§ 550. Duress consists in

1. Unlawful confinement of the person of the party,[1] or of the husband or wife of such party, or of an ancestor, descendant,[2] or adopted child[3] of such party, husband, or wife;[4]

2. Unlawful detention of the property of any such person;[5]

3. Confinement of such person, lawful in form, but fraudulently obtained,[6] or fraudulently made unjustly harassing or oppressive;[7]

4. Taking an oppressive and unconscientious advantage of the necessities of the party.[8]

[1] Foshay *v.* Ferguson, 5 *Hill*, 154; Bac. Abr., *Duress, A.*

[2] Code La., 1847; Code Napoleon, 1113; Bac. Abr. *Duress, B.* See McClintock *v.* Cummins, 3 *McLean*, 158.

[3] New, but in effect provided for by the French and Louisiana law.

[4] Code Napoleon, 1113.

[5] This is denied (Skeate *v.* Beale, 11 *Ad. & El.*, 983; Atlee *v.* Backhouse, 3 *M. & W.*, 650). But it was originally so held in privy council (Assize, 5 Year Book, fol. 72, pl. 14), and it has been so decided in this country (Collins *v.* Westbury, 2 *Bay*, 211; Sasportas *v.* Jennings, 1 *Bay*, 470; see also Nelson *v.* Suddarth, 1 *Hen. & Mumf.*, 350), with the approval of Bronson, J. (Foshay *v.* Ferguson, 5 *Hill*, 158.) It is universally held that *money paid* under such duress may be recovered back (Harmony *v.* Bingham, 12 *N. Y.*, 99; Oates *v.* Hudson, 6 *Exch.*, 346; Atlee *v.* Backhouse, 3 *M. & W.*, 642); and it is very difficult to see why, under precisely similar circumstances, a note given instead of money should be enforced.

[6] Strong *v.* Grannis, 26 *Barb.*, 122; Watkins *v.* Baird, 6 *Mass.*, 511; Richardson *v.* Duncan, 3 *N. H.*, 508.

[7] Severance *v.* Kimball, 8 *N. H.*, 386; Richardson *v.* Duncan, *supra.*

[8] Breck *v.* Cole, 4 *Sandf.*, 88; Bowes *v.* Heaps, 3 *Ves. & B.*, 119; Wood *v.* Abrey, 3 *Madd.*, 423; Gould *v.* Okeden, 4 *Bro. P. C.*, 198; see Cockshot *v.* Bennet, 2 *T. R.*, 763; Barnardiston *v.* Lingood, 2 *Atk.*, 133; Thornhill *v.* Evans, *id.*, 330; Walmsley *v.* Booth, *id.*, 28, 29; Berney *v.* Pitt, 2 *Vern.*, 14; Nott *v.* Hill, *id.*, 27; Wiseman *v.* Beake, *id.*, 121; Roche *v.* O'Brien, 1 *Ball & B.*, 337, 359; Bromley *v.* Smith, 26 *Beav.*, 664; 5 *Jur.* (*N. S.*), 837.

Menace.

§ 551. The menace must be

1. Of such duress as is specified in the first and third subdivisions of the last section;[1]

2. Of unlawful and violent injuries to the person[2] or property[3] of any such person as is specified in the last section;

3. Of injuries to the character of any such person.[4]

[1] Whitefield *v.* Longfellow, 13 *Maine*, 146.

[2] 2 *Co. Inst.*, 483; *Bac. Abr.*, *Duress*, *A.*

[3] See Foshay *v.* Ferguson, 5 *Hill*, 158. See contra, *Bac. Abr.*, *Duress*, *A.* See note below.

[4] This species of threat is not usually included in the definition of duress, and was no doubt not so treated under the old common law, when a libeler could be made to rot in jail until he paid damages, while neither the judgment creditor nor any one else was bound to find him food or drink (Dive *v.* Maningham, 1 *Plowd.*, 68); and when some debtors did actually starve to death. With such a savage remedy for the recovery of pecuniary damages, they might well be considered an adequate compensation for all injuries to property or character, and it was on this ground that they were not regarded as duress. (*Bac. Abr.*, *Duress*, *A.*) The remedy now existing is less effective, nor is money considered equivalent to character. By statute, it is now a criminal offense to send threatening letters for the purpose of extorting money, and that which is thus treated as a crime ought not to be allowed to sustain a contract. These views are further sustained by *Story Cont.*, § 398; 2 *Stark. Ev.*, 482; *Chitt. Cont.*, 208.

Fraud, actual or constructive.

§ 552. Fraud is either actual or constructive.

Actual fraud.

§ 553. Actual fraud consists

1. In any artifice by which one obtains an unconscientious advantage over another;[1]

2. In any unconscientious use of a power or advantage obtained through a personal confidence voluntarily accepted.[2]

[1] *Story Eq. Jur.*, § 187; Gale *v.* Gale, 19 *Barb.*, 251; *Jeremy Eq. Jur.*, 358; *Pothier Obl.*, n. 28; Gardner *v.* Heartt, 3 *Denio*, 236.

[2] Gardner *v.* Ogden, 22 *N. Y.*, 327; McQueen *v.* Farquhar 11 *Ves.*, 479; *Story Eq. Jur.*, §§ 255, 257; see Clarke *v.* Parker, 19 *Ves.*, 18.

Constructive fraud.

§ 554. Constructive fraud consists

1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault or any one claiming under him, by misleading another to his prejudice, or the prejudice of any one claiming under him;[1]

[1] Bulkley *v.* Wilford, 1 *Clark & Fin.*, 102, 177, 181.

2. In such acts or omissions as the law specially declares to be fraudulent, without respect to actual fraud.

Actual fraud is a question of fact.

§ 555. Actual[1] fraud is always a question of fact.[2]

[1] Dunham *v.* Waterman, 17 *N. Y.*, 21; Wilson *v.* Forsyth, 24 *Barb.*, 105.

[2] 2 R. S., 137.

Undue influence.

§ 556. Undue influence consists in the use, by one occupying a relation of personal confidence toward another,[1] of the slightest oppression, authority,[2] deception, suppression of fact,[3] or artifice, or of excessive solicitation,[4] to procure an advantage from the latter.

[1] Sears *v.* Shafer, 6 *N. Y.*, 272.

[2] Bury *v.* Oppenheim, 26 *Beav.*, 594; Nottidge *v.* Prince, 2 *Giff.*, 246; Slocum *v.* Marshall, 2 *Wash. C. C.*, 400, Taylor *v.* Taylor, 8 *How. U. S.*, 183.

[3] Anderson *v.* Elsworth, 3 *Giff.*, 154; Cane *v.* Allen, 2 *Dow*, 294.

[4] See Gibson *v.* Jeyes, 6 *Ves.*, 266; Maitland *v.* Irving, 15 *Sim.*, 437.

Mistake of fact or of law.

§ 557. Mistake may be either of fact or of law.[1]

[1] As to mistake of fact there is no question. Mistake of law has been often declared to be no ground for relief at law or equity. See Champlin *v.* Laytin, 18 *Wend.*, 417; Storrs *v.* Parker, 6 *Johns. Ch.*, 166; Lyon *v.* Richmond, 2 *id.*, 61; *Story Eq. Jur.*, §§ 111–139. But the contrary view has been taken by judges of high authority. See Champlin *v.* Laytin, 18 *Wend.*, 422; Stone *v.* Godfrey, 5 *De G. M. & G.*, 90; Broughton *v.* Hutt, 3 *De G. & J.*, 501; Evants *v.* Strode, 11 *Ohio*, 480.

§ 558. Mistake of fact is either

Mistake of fact.

1. An unconscious ignorance[1] or forgetfulness[2] of a fact past[3] or present,[4] material to the contract;

2. Belief in the present existence of that which does not exist,[5] or in the past existence of that which has not existed,[6] the thing believed being material to the contract.

[1] Bell *v.* Gardiner, 4 *M. & G.*, 10; as limited by M'Daniels *v.* Bank of Rutland, 29 *Vt.*, 238.

[2] Kelly *v.* Solari, 9 *M. & W.*, 54; Lucas *v.* Worswick, 1 *Moo. & Rob.*, 293.

[3] Willan *v.* Willan, 16 *Ves.*, 72; M'Carthy *v.* De Caix, 2 *Russ. & M.*, 614.

[4] Kelly *v.* Solari, *supra.*

[5] Hitchcock *v.* Giddings, 4 *Price*, 135; *Dan.*, 1; Hastie *v.* Couturier, 9 *Exch.*, 102; affirmed, 5 *H. of L. Cas.* 673; Strickland *v.* Turner, 7 *Exch.*, 208. See Belknap *v.* Sealey, 14 *N. Y.*, 143; Martin *v.* M'Cormick, 8 *N. Y.*, 335; Ketchum *v.* Bank of Commerce, 19 *N. Y.*, 502.

[6] See Martin *v.* M'Cormick, 8 *N. Y.*, 335.

§ 559. Mistake of law constitutes a mistake, within the meaning of this article, only when it arises from

Mistake of law.

1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law;[1]

2. A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify.

[1] Many *v.* Beekman Iron Co., 9 *Paige*, 188; Hall *v.* Reed, 2 *Barb. Ch.*, 501.

§ 560. Mistake of foreign laws is mistake of fact.[1]

Mistake of foreign laws

[1] Bank of Chillicothe *v.* Dodge, 8 *Barb.*, 233.

§ 561. A mistake made through willful ignorance,[1] or by neglecting a legal duty,[2] does not invalidate the consent.

Mistake through willful ignorance.

[1] Kelly *v.* Solari, 9 *M. & W.*, 54.

[2] United States Bank *v.* Bank of Georgia, 10 *Wheat.*, 343

§ 562. Consent is not mutual, unless the parties all agree upon the same thing in the same sense. But in certain cases defined by the chapter on INTERPRETATION, they are deemed so to agree without regard to the fact.

Mutuality of consent.

§ 563. Consent can be communicated with effect, only by some act or omission by which the person contracting

Communication of consent.

intends to communicate it, or which necessarily tends to such communication.

Mode of communicating acceptance of proposals.

§ 564. If a proposal prescribes any conditions concerning the communication of its acceptance, the proposer is not bound unless they are conformed to; but in other cases any reasonable and usual mode may be adopted.[1]

[1] Dunlop v. Higgins, 1 *H. of L. Cas.*, 398; Vassar v. Camp, 11 *N. Y.*, 451.

When communication of acceptance concludes contract.

§ 565. Consent is communicated by each party to the other and the contract is complete, as soon as the person accepting a proposal has put his acceptance in the course of transmission to the proposer, in conformity to the last section.[1]

[1] Mactier v. Frith, 6 *Wend.*, 103; Vassar v. Camp, 11 *N. Y.*, 441.

Acceptance by performance of conditions.

§ 566. Performance of the conditions of a proposal is an acceptance thereof.[1]

[1] Harvey v. Johnston, 6 *C. B.*, 304.

Acceptance must be absolute.

§ 567. An acceptance must be absolute and unqualified,[1] or must include in itself an acceptance of that character, which the proposer can separate from the rest, and which will conclude the person accepting.[2] A qualified acceptance is a new proposal.

[1] Hough v. Brown, 19 *N. Y.*, 114, 115; Code La., 1799; Borland v. Guffey, 1 *Grant (Pa)*, 394.
[2] Code La., 1801.

Revocation, of proposal.

§ 568. A proposal may be revoked at any time before its acceptance is communicated, but not afterwards.[1]

[1] Routledge v. Grant, 4 *Bing.*, 653; Head v. Diggon, 3 *Man. & R.*, 97; Cooke v. Oxley, 3 *T. R.*, 653.

Revocation, how made.

§ 569. A proposal is revoked by

1. The receipt of notice of revocation from the proposer by the other party before acceptance;

2. The lapse of the time prescribed therein for its acceptance, or if no time is prescribed, the lapse of a reasonable time without acceptance;

3. The failure to fulfill a condition precedent to acceptance;

4. The death or insanity of the proposer.

The Palo Alto, *Daveis R.*, 356.

Ratification of contract void for want of consent

§ 570. A contract which is void for want of due consent, may, if not unlawful in its purpose,[1] be ratified by a subsequent consent.[2]

[1] Gray *v.* Hook, 4 *N. Y.*, 449.
[2] Newton *v.* Bronson, 13 *N. Y.*, 595.

## ARTICLE V.

### CONSIDERATION.

SECTION 571. Good consideration, what.
572. How far legal or moral obligation is a good consideration.
573. Consideration, unlawful.

Good consideration, what.

§ 571. Any benefit conferred,[1] or agreed to be conferred,[2] upon the promisor, by any other person,[3] or any prejudice suffered,[4] or agreed to be suffered,[5] by such person,[6] at the time of consent,[7] as an inducement to the promiser, is a good consideration for a promise.

[1] Johnson *v.* Titus, 2 *Hill*, 606; Oakley *v.* Boorman, 27 *Wend.*, 588; see Hamilton College *v.* Stewart, 1 *N. Y.*, 581.
[2] Houghtailing *v.* Randen, 25 *Barb.*, 21; Sage *v.* Hazard, 6 *id.*, 179; Briggs *v.* Tillotson, 8 *Johns.*, 304.
[3] Lawrence *v.* Fox, 20 *N. Y.*, 268; Judson *v.* Gray, 17 *How. Pr.*, 289, 296.
[4] Miller *v.* Drake, 1 *Caines*, 45; Rutgers *v.* Lucet, 2 *Johns. Cas.*, 92; Parker *v.* Crane, 6 *Wend.*, 647; Stuart *v.* McGuin, 1 *Cow.*, 99; Elting *v.* Vanderlyn, 4 *Johns.*, 237; Smith *v.* Weed, 20 *Wend.*, 184; Heinman *v.* Moulton, 14 *Johns.*, 466; Hilliard *v.* Austin, 17 *Barb.*, 141.
[5] Conover *v.* Brush, 2 *N. Y. Leg. Obs.*, 289; Decker v. Judson, 16 *N. Y.*, 449.
[6] Decker *v.* Judson, *supra.*
[7] Livingston *v.* Rogers, *Cole. & C. Cas.*, 331; Utica & Syracuse R. R. *v.* Brinckerhoff, 21 *Wend.*, 139; Roscorla *v.* Thomas, 3 *Q. B.*, 234.

**How far legal or moral obligation is a good consideration.**

§ 572. An existing legal[1] or moral obligation resting upon the promiser,[2] is also a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise.[3]

[1] Spencer *v.* Ballou. 18 *N. Y.*, 330.

[2] The common law does not recognise moral obligations, except in a few cases, as sufficient to sustain a promise. (Goulding *v.* Davidson, 28 *Barb.*, 438; Nash *v.* Russell, 5 *Barb.*, 556; Geer *v.* Archer. 2 *Barb*, 420; Watkins *v.* Halstead, 2 *Sandf.*, 311; Ehle *v.* Judson, 24 *Wend.*, 97; Smith *v.* Ware, 13 *Johns.*, 257; Beaumont *v.* Reeve, 8 *Q. B.*, 483; Eastwood *v.* Kenyon, 11 *Ad. & El.*, 438. But see contra, Doty *v.* Brown, 14 *Johns.*, 381; Lee *v.* Muggeridge, 5 *Taunt*, 36). The authorities, however, entirely fail to establish any satisfactory principle upon which to distinguish between the different species of moral obligations. Thus in Bunn *v.* Winthrop (1 *Johns. Ch.*, 329,) past seduction is held a good consideration. In Beaumont *v.* Reeve (8 *Q. B*, 483), the very reverse is decided. In Goulding *v.* Davidson (28 *Barb.*, 438.) it is said that there must have been at some time an actual *legal* obligation, yet in Rice *v.* Welling (5 *Wend*, 595,) and Early *v.* Mahon, (19 *Johns.*, 147), the original contract was usurious, and therefore void *ab initio*. The same may be said of promises to pay debts contracted in infancy, which are held valid.

The only proper course seems to be, either to declare that *no* moral obligations amount to a consideration for a promise, or that *any* do.

[3] Roscorla *v.* Thomas, 3 *Q. B.*, 234; Hopkins *v.* Logan, 5 *M. & W.*, 247.

**Consideration unlawful.**

§ 573. If any part of the consideration is unlawful, the contract is void.[1]

[1] Pepper *v.* Haight, 20 *Barb.*, 429; Barton *v.* Port Jackson P. R. Co., 17 *Barb.*, 397; Burt *v.* Place, 6 *Cow.*, 431.

## CHAPTER II.

### MANNER OF CREATING CONTRACTS.

SECTION 574. Contracts, express or implied.
575. Express contract.
576. Implied contract.
577. Oral contracts.
578. What contracts must be written.
579. Effect of writing.
580. Contract in writing takes effect from delivery.
581. Seal, effect of.
582. Seal, how affixed, &c.

§ 574. Contracts are either express or implied. **Contracts, express or implied.**

§ 575. An express contract is one the terms of which are stated in words. **Express contract.**

§ 576. An implied contract is one the existence and terms of which are manifested by conduct. **Implied contract.**

§ 577. All contracts may be made orally, except such as are specially required by statute to be in writing. **Oral contracts.**

§ 578. The following contracts or some memorandum thereof, expressing the consideration, must be in writing, subscribed by the party to be charged thereby, or by his agent for the purpose: **What contracts must be written.**

1. An agreement that, by its terms, cannot be performed within one year;

2. An agreement made upon consideration of marriage, other than mutual promises to marry.

See note to § 1.80.

§ 579. The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter, which preceded or accompanied the execution of the instrument.[1] **Effect of writing.**

[1] Baker v. Higgins, 21 N. Y., 396; Lamatt v. Hudson Riv. Ins. Co., 17 N. Y., 199 n; Durgin v. Ireland, 14 N. Y., 322; as explained in Blossom v. Griffin, 13 N. Y., 573.

Contract in writing takes effect from delivery.

§ 580. A contract in writing takes effect upon its delivery to the party in whose favor it is made, or to his agent.[1]

The provisions of the chapter on TRANSFERS OF REAL PROPERTY, concerning delivery of deeds, absolute and conditional, apply to all written contracts.

[1] Vorplank *v.* Sterry, 12 *Johns.*, 536; comparo Elsey *v.* Metcalf, 1 *Den.*, 323.

Seal, effect of.

§ 581. A seal is presumptive evidence of a consideration.

Seal, how affixed, &c.

§ 582. A corporate or official seal may be affixed to an instrument by a mere impression upon the paper or other material on which such instrument is written.[1] All other seals must be affixed by means of an impression upon a tenacious substance fastened to the instrument.[2]

[1] 3 R S. (5th ed.), 687.

[2] Warren *v.* Lynch, 5 *Johns.*, 239; Andrews *v.* Herriot, 4 *Cow.*, 508.

## CHAPTER III.

### INTERPRETATION OF CONTRACTS.

SECTION 583. Contracts, how to be interpreted.
584. Intention of parties, how ascertained.
585. Intention to be ascertained from language.
586. Fraud, mistake or accident concealing intention of parties.
587. Effect to be given to every part of contract.
588. Several contracts relating to same matters.
589. Words to be understood in usual sense.
590. Technical words.
591. Law of place.
592. Contract explained by circumstances.
593. Contract restricted to its evident object.
594. Particular clauses subordinate to general intent.
595. Writing controls printed parts of contract.
596. Repugnancies to be reconciled, &c.
597. Rejection of words wholly inconsistent.
598. Words to be taken most strongly against whom.
599. Reasonable stipulations, when implied.
600. Necessary incidents of contract implied.
601. Time of performance of contract.
602. Same rules of interpretation apply to all contracts.
603. Usage defined.

§ 583. Contracts must be so interpreted as to give effect to the mutual intention of the parties,[1] as it existed at the time of contracting,[2] so far as the same is ascertainable and lawful.

Contracts, how to be interpreted.

[1] Belmont v. Coman, 22 *N. Y.*, 439.
[2] Story Cont., § 656.

§ 584. The intention of the parties is to be ascertained by the rules hereinafter stated.

Intention of parties, how ascertained.

§ 585. The language of the contract is to govern, if clear and explicit, and not involving an absurdity.[1] When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible.

Intention to be ascertained from language.

[1] Code La., 1940; see Westcott v. Thompson, 18 *N. Y.*, 367; Buck v. Burk, *id.*, 339.

§ 586. When it is clearly proved[1] that through fraud,[2] mistake or accident,[3] a written contract fails to express the real intention of the parties, such real intention is to be regarded, and the erroneous parts of the writing disregarded.[4]

Fraud, mistake or accident concealing intention of parties.

[1] Coles v. Bowne, 10 *Paige*, 526; Lyman v. Mut. Ins. Co., 2 *Johns. Ch.*, 630; affirmed, 17 *Johns.*, 373.
[2] De Peyster v. Hasbrouck, 11 *N. Y.*, 582.
[3] Wood v. Hubbell, 10 *N. Y.*, 479; Gillespie v. Moon, 2 *Johns. Ch.*, 585; Story Eq. Jur., § 152.
[4] Under the Code of Procedure, it is not necessary that the contract should be reformed, but it should be construed according to the actual intent of the parties. See Bidwell v. Astor Ins. Co., 16 *N. Y.*, 263; N. Y. Ice Co. v. N. W. Ins. Co., 12 *Abb. Pr.*, 414; 23 *N. Y.*, 357.

§ 587. The whole contract is to be taken together, so as to give effect to every part,[1] if reasonably practicable,[2] each one clause interpreting the others.[3]

Effect to be given to every part of contract.

[1] Code La., 1950; Ward v. Whitney, 8 *N. Y.*, 446; Decker v. Furniss, 14 *id.*, 615, 622; Hamilton v. Taylor, 18 *id.*, 361.
[2] Westcott v. Thompson, 18 *N. Y.*, 366.
[3] Miller v. Travers, 8 *Bing.*, 244; Story Cont., § 657.

§ 588. Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together.[1]

Several contracts relating to same matter.

[1] Hamilton v. Taylor, 18 *N. Y.*, 361; Church v. Brown, 21 *N. Y.*, 319, 330; Pepper v. Haight, 20 *Barb.*, 429; limited, Mann v. Witbeck, 17 *Barb.*, 388.

Words to be understood in usual sense.

§ 589. Words are to be understood in their ordinary and popular sense,[1] unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.[2]

[1] Story Cont., § 647; Code La., 1941.

[2] Smith *v.* Wilson, 3 *B. & Ad.*, 728; see Hinton *v.* Locke, 5 *Hill*, 437; Astor *v.* Union Ins. Co., 7 *Cow.*, 202; Cuthbert *v.* Cumming, 11 *Exch.*, 405; affirming, 10 *id.*, 809; Coit *v.* Corn Ins. Co., 7 *Johns.*, 385.

Technical words.

§ 590. Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate.[1]

[1] Code La., 1942.

Law of place.

§ 591. A contract is to be interpreted according to the law and usage of the place where it is to be performed;[1] or if it does not indicate a place of performance, according to the law and usage of the place where it is made.[2]

[1] Story Confl. Laws, §§ 270, 280; Curtis *v.* Leavitt, 15 *N. Y.*, 9; Jacks *v.* Nichols, 5 *id.*, 178; Cutler *v.* Wright, 22 *id.*, 480.

[2] Story Confl. Laws, § 282; Thompson *v.* Ketcham, 8 *Johns.*, 189; Pomeroy *v.* Ainsworth, 22 *Barb.*, 118, 130; Curtis *v.* Leavitt, 15 *N. Y.*, 9; Gibbs *v.* Fremont, 9 *Exch.*, 25.

Contract explained by circumstances.

§ 592. It may also be explained by reference to the circumstances under which it was made.[1]

[1] Westcott *v.* Thompson, 18 *N. Y.*, 366; Blossom *v.* Griffin, 13 *id.*, 569; Moore *v.* Meacham, 10 *id.*, 207; Doolittle *v.* Southworth, 3 *Barb.*, 79; Hasbrook *v.* Paddock, 1 *id.*, 635.

Contract restricted to its evident object.

§ 593. However broad the terms of a contract may be, it extends only to those things concerning which it appears that the parties intended to contract.[1]

[1] Code La., 1954; Code Napoleon, 1163.

Particular clauses are subordinate to general intent.

§ 594. Particular clauses are subordinate to the general intent of the contract.[1]

[1] Decker *v.* Furniss, 14 *N. Y.*, 615; Kelley *v.* Upton, 5 *Duer*, 340.

§ 595. The written parts of a contract control the printed parts, and if the two are absolutely repugnant, the latter must in so far be disregarded.[1]

Writing controls printed parts of contract.

[1] Harper *v.* N. Y. City Ins. Co., 22 *N. Y.*, 444; Harper *v.* Albany Ins. Co., 17 *id.*, 198; see People *v.* Saxton, 22 *id.*, 309.

§ 596. Repugnancies must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses,[1] subordinate to the general intent and object of the whole contract.[2]

Repugnancies to be reconciled, &c.

[1] Code La., 1940; Ward *v.* Whitney, 8 *N. Y.*, 446.
[2] Casler *v.* Conn. Ins. Co., 22 *N. Y.*, 425; see Harper *v.* N. Y. City Ins. Co., *id.*, 441.

§ 597. Words which are wholly inconsistent with the nature of the contract, are to be rejected.[1]

Rejection of words wholly inconsistent.

[1] Simpson *v.* Vaughan, 2 *Atk.*, 32; Vernon *v.* Alsop, *T. Raym.*, 68; Story Cont., §§ 635, 636, 660.

§ 598. In case of uncertainty not removed by the preceding rules, language should be interpreted most strongly against the party who caused the uncertainty to exist.[1]

Words to be taken most strongly against whom.

[1] Code La., 1952, 1953. See Harper *v.* N. Y. City Ins. Co., 22 *N. Y.*, 441; Marvin *v.* Stone, 2 *Cow.*, 781. For the proper limits to the use of the word "ambiguity," see Ashworth *v.* Mounsey, 9 *Exch.*, 186.

§ 599. Stipulations which are necessary to make the contract reasonable,[1] or conformable to a valid usage,[2] are implied, in respect to matters concerning which the contract manifests no contrary intention.[3]

Reasonable stipulations, when implied.

[1] Jones *v.* Gibbons, 8 *Exch.*, 922.
[2] Pollock *v.* Stables, 12 *Q. B.*, 765; Bayliffe *v.* Butterworth, 1 *Exch.*, 425; Syers *v.* Jonas, 2 *id.*, 116; Hutton *v.* Warren, 1 *M. & W.*, 475; Humfrey *v.* Dale, 7 *E. & B.*, 266.
[3] Mutual Ins. Co. *v.* Hone, 2 *N. Y.*, 241; Vail *v.* Rice, 5 *id.*, 155; Hutton *v.* Warren, 1 *M. & W.*, 475.

§ 600. Everything that in law or usage is considered as incidental to the contract, or as necessary to carry it into effect, is implied therefrom.

Necessary incidents of contract implied.

Time of performance of contract.

§ 601. If no time is specified for the performance of an act required to be performed, a reasonable time is allowed.[1] If such act consists in the payment of money only, it is payable immediately.[2]

[1] Atwood *v.* Emery, 1 *C. B.* (*N. S.*), 110; Hoggins *v.* Gordon, 3 *Q. B.*, 466; Sansom *v.* Rhodes, 6 *Bing. N. C.*, 261; Stavart *v.* Eastwood, 11 *M. & W.*, 197.

[2] Lake Ontario R. R. *v.* Mason, 16 *N. Y.*, 451; Thompson *v.* Ketcham, 8 *Johns.*, 189; Gibbs *v.* Southam, 9 *B. & Ad.*, 911.

Same rules of interpretation apply to all contracts.

§ 602. All contracts, whether public or private, sealed or unsealed, are to be interpreted by the same rules.[1]

[1] Some distinctions are made at common law, which have no foundation in reason at present. Grants by the state are not to be construed as liberally as were grants by a monarch. See per STORY, J., Charles Riv. Br. *v.* Warren Br., 11 *Peters*, 589.

Usage defined.

§ 603. Usage is a public custom concerning transactions of the same nature as those which are to be affected thereby,[1] existing at the place in which the contract is to be performed,[2] and either known to the parties,[3] or so well established,[4] general,[5] uniform[6] and notorious,[7] that they must be presumed to have contracted with reference thereto.[8] An unreasonable[9] or illegal[10] custom is void.

[1] Cuthbert *v.* Cumming, 11 *Exch.*, 408; Code La., 1961.

[2] Stewart *v.* Aberdein, 4 *M. & W.*, 211; see Sweeting *v.* Pearce, 7 *C. B.* (*N. S.*), 481; Horton *v.* Morgan, 19 *N. Y.*, 170.

[3] Cuthbert *v.* Cumming, 11 *Exch.*, 405, aff'g, 10 *id.*, 809; Graves *v.* Legg, 2 *H. & N.*, 210; aff'g, 11 *Exch.*, 642; 9 *id.*, 709.

[4] Smith *v.* Wright, 1 *Cai.*, 43; U. S. *v.* Buchanan, 8 *How. U. S.*, 102.

[5] Sweeting *v.* Pearce, *supra;* Gabay *v.* Lloyd, 3 *B. & C.*, 793; Scott *v.* Irving, 1 *B. & Ad.*, 605; Todd *v.* Reid, 4 *B. & Ald.*, 210; Lewis *v.* Marshall, 7 *M. & G.*, 745; Cope *v.* Dodd, 13 *Penn. St.*, 37.

[6] U. S. *v.* Buchanan, 8 *How. U. S.*, 102; Cope *v.* Dodd, 13 *Penn. St.*, 33, 37; Wood *v.* Wood, 1 *Curr. & P.*, 59; Lewis *v.* Marshall, *supra.*

[7] Cope *v.* Dodd, 13 *Penn. St.*, 37.

[8] Hinton *v.* Locke, 5 *Hill*, 439; U. S. *v.* Buchanan, 8 *How., U. S.*, 102. See Wadsworth *v.* Alcott, 6 *N. Y.*, 72.

[9] Bowen *v.* Stoddard, 10 *Metc.*, 30. See Cuthbert *v.* Cumming, 10 *Exch.*, 815; aff'd, 11 *id.*, 405.

[10] Merchants' Bk. *v.* Woodruff, 6 *Hill*, 174; Bowen *v.* Newell, 8 *N. Y.*, 190.

## CHAPTER IV.

### EFFECT OF CONTRACTS.

SECTION 604. Effect.
605. Who is a party.

§ 604. Contracts have the effect of a legal obligation upon the contracting parties. They can be revoked only by the mutual consent of the parties, or for lawful causes. Effect.

Code Napoleon, 1134.

§ 605. One for whose benefit a contract is made between other persons, to which his consent is given or is to be presumed, is deemed a party within the meaning of the last section. Who is a party.

## CHAPTER V.

### THE DIFFERENT SPECIES OF CONTRACTS.

ARTICLE I. Joint or several contracts.
II. Conditional contracts.
III. Alternative contracts.
IV. Executed and executory contracts.
V. Penal contracts.

## ARTICLE I.

### JOINT OR SEVERAL CONTRACTS.

SECTION 606. Joint or several, &c.
607. When contract is joint.
608. Contract is joint for all or several for all the contracting parties.
609. Contribution between joint parties.

§ 606. A contract entered into by two or more persons on either side, may be joint, or several, or joint and several. Joint or several, &c.

When contract is joint.

§ 607. When there are two or more parties to a contract on either side, their rights and obligations are joint, and not several unless a different intention is manifested by them.

Contract is joint for all or several for all the contracting parties.

§ 608. The party seeking to enforce a joint and several contract, must treat it as joint for all, or as several for all the contracting parties on the other side. He cannot treat it as joint for some and several for the rest.

Contribution between joint parties.

§ 609. A party to a joint or joint and several contract, may, if he satisfies more than his share of the claim against all, require a proportionate contribution from all the parties joined with him.[1]

[1] Story Cont., § 33, *q*.

## ARTICLE II.

### CONDITIONAL CONTRACTS.

SECTION 610. Conditional contracts.
611. Conditions, kinds of.
612. Conditions precedent.
613. Conditions concurrent.
614. Condition subsequent.
615. Performance, &c., of conditions precedent and concurrent, when essential.
616. Impossible or unlawful conditions void.
617. Conditions involving forfeiture.

Conditional contracts.

§ 610. A contract is conditional, when the obligations of any party thereto depend upon the occurrence of an uncertain event.

Conditions, kinds of.

§ 611. Conditions may be precedent, concurrent, or subsequent.

Conditions precedent.

§ 612. A condition precedent is one which is required by the contract to be performed before some right dependent thereon accrues, or some act dependent thereon, is performed.

Conditions concurrent.

§ 613. Conditions concurrent are those which are mutually dependent, and are required by the contract to be performed at the same time.

§ 614. A condition subsequent is one referring to a future event, upon the happening of which the contract becomes no longer obligatory upon the other party, if he chooses to avail himself of the condition. **Condition subsequent.**

§ 615. Before any party to a contract can require another party to fulfill his obligations under the same, he must himself fulfill all conditions precedent thereto imposed upon him;[1] and must be ready, and offer, to fulfill all conditions concurrent, so imposed upon him, on the like fulfillment by the other party.[2] **Performance, &c., of conditions precedent and concurrent, when essential.**

[1] Oakley *v.* Morton, 11 *N. Y.*, 25; Smith *v.* Brady, 17 *N. Y.*, 173; Cunningham *v.* Jones, 20 *id.*, 486.

[2] Beecher *v.* Conradt, 13 *N. Y.*, 108; Dunham *v.* Pettee, 8 *id.*, 508.

§ 616. Conditions that are impossible or unlawful, within the meaning of the article on the OBJECT OF CONTRACTS, are void.[1] Conditions are also void if repugnant to the nature of the interest or estate created by the contract.[2] **Impossible or unlawful conditions void.**

[1] Story Cont., § 32, *b.*

[2] De Peyster *v.* Michael, 6 *N. Y.*, 496.

§ 617. Conditions involving a forfeiture are to be strictly interpreted against those for whose benefit they are created.[1] **Conditions involving forfeiture.**

[1] Catlin *v.* Springfield Ins. Co., 1 *Sumner*, 440.

## ARTICLE III.

### ALTERNATIVE CONTRACTS.

SECTION 618. Who may select the alternative.
619. Alternative indivisible.
620. Nullity of one or more of the alternative obligations.

§ 618. If a contract requires the performance of either of two or more acts, in the alternative, and it does not appear to whom the parties intended to give the right of selection, the person required to perform has that right.[1] But he must make his selection within the time fixed by the contract,[2] or if none is fixed, in a reasonable time, or the other party may make such selection. **Who may select the alternative.**

[1] Smith *v.* Sanborn, 11 *Johns.*, 59; Disbrough *v.* Neilson, 3 *Johns. Cas.*, 81.

[2] Sage *v.* Hazard, 6 *Barb.*, 179; McNett *v.* Clark, 7 *Johns.*, 465.

Alternatives indivisible.

§ 619. The party having the right of selection must select one or the other of the alternatives in its entirety. He cannot select part of one and part of the other, without the consent of the other party.[1]

[1] Code La., 2064.

Nullity of one or more of the alternative obligations.

§ 620. If one or more of the alternative obligations of a contract are void, the contract is to be interpreted as though the other stood alone.[1]

[1] Code La., 2065.

## ARTICLE IV.

### EXECUTED AND EXECUTORY CONTRACTS.

SECTION 621. Executed and executory contracts defined.

Executed and executory contracts defined.

§ 621. An executed contract is one of which any part is performed. All others are executory.

## ARTICLE V.

### PENAL CONTRACTS.

SECTION 622. Penalty for non-performance of contract, void.
623. When stipulated damages for non-performance is conclusive.

Penalty for non-performance of contract, void.

§ 622. Penalties imposed by contract for any non-performance thereof, are void. But this section does not render void such bonds or obligations, penal in form, as have heretofore been commonly used; it merely rejects and avoids the penal clauses.

When stipulated damages for non-performance is conclusive.

§ 623. The parties to a contract may agree therein upon the amount of damages to be paid by one to the other, upon a breach of contract, when, from the nature of the case, the actual damage sustained thereby cannot be fully ascertained. They may also, when, from the nature of the case, it would be difficult to ascertain such actual damage, agree upon a specified amount as presumptive evidence of the extent of the damage. In every other case an agreement to pay any specific amount as damages, or in any other

way to compensate for a breach of contract or duty, in anticipation thereof, is void.[1]

[1] The use of the phrase "liquidated damages" leads frequently to an evasion of the law in respect to penalties. The courts, not venturing to declare such contracts void, constantly discourage them. They are oppressive and unconscientious, except in the cases permitted above, and ought not to be allowed. See Bagley *v.* Peddie, 16 *N. Y.*, 469; Lampman *v.* Cochran, *id.*, 275.

# TITLE III.

## OBLIGATIONS IMPOSED BY LAW.

SECTION 624. To abstain from injuring another.
625. Restoration of thing given by mistake.
626. Responsibility for wilful acts, negligence, &c.

**To abstain from injuring another.**

§ 624. Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing any of his rights.

**Restoration of thing given by mistake.**

§ 625. One to whom another has given anything by such mistake as is defined in the chapter on CONTRACTS, must restore the same on demand, if the mistake was mutual;[1] and without demand,[2] if he knew or suspected, or ought to have known, of the mistake of the other.[3]

[1] See Kelly *v.* Solari, 9 *M. & W.*, 58.
[2] Utica Bank *v.* Van Gieson, 18 *Johns.*, 485.
[3] See Code La., 2279, 2280; Code Napoleon, 1376, 1377.

**Responsibility for wilful acts, negligence, &c.**

§ 626. Every one is responsible, not only for the results of his wilful acts, but also for an injury occasioned to another by his want of ordinary care,[1] unless the latter has, wilfully, or by want of ordinary care, incurred the risk of such injury.[2] The extent of liability in such cases is defined by the title on DAMAGES.

[1] Code La., 2295; Code Napoleon, 1383.
[2] Johnson *v.* Hudson River R. R. Co., 20 *N. Y.*, 69.

# TITLE IV.

## EXTINCTION OF OBLIGATIONS.

CHAPTER I. Performance and payment.
II. Offer of performance.
III. Prevention of performance.
IV. Accord and satisfaction.
V. Novation.
VI. Rescission.
VII. Release.
VIII. Alteration of instrument.

## CHAPTER I.

### PERFORMANCE AND PAYMENT.

SECTION 627. Obligation extinguished by performance. Payment.
628. Performance by third person.
629. Partial performance, effect of.
630. Payment, how made.
631. Payment by one of several joint debtors.
632. Payment to one of several joint creditors.
633. Payment in manner prescribed by creditor.
634. Acceptance of payment through a third person.
635. Creditor's retention of thing which he refuses to receive in payment.
636. Liquidated debts not satisfied by payment of a less sum.
637. Application of payments.

Obligation extinguished by performance. Payment.

§ 627. Full performance of an obligation extinguishes it. Performance of an obligation for the delivery of money only, is called payment.

Performance by third person.

§ 628. The performance of an obligation by a third person does not extinguish it, though accepted by the creditor as a satisfaction thereof,[1] unless such performance is made on account of such obligation, with the assent of the debtor.[2]

[1] Muller *v.* Eno, 14 *N. Y.*, 605; Daniels *v.* Hallenbeck, 19 *Wend.*, 408; Bleakley *v.* White, 4 *Paige*, 655.

[2] Kemp *v.* Balls, 10 *Exch.*, 607; Jones *v.* Broadhurst, 9 *C. B.*, 173; Belshaw *v.* Bush, 11 *C. B.*, 191; Simpson *v.* Eggington, 10 *Exch.*, 845; James *v.* Isaacs, 12 *C. B.*, 791.

Partial performance, effect of.

§ 629. A partial performance of an indivisible obligation extinguishes a corresponding proportion thereof, if

the benefit of such performance is voluntarily retained by the creditor, but not otherwise.[1]

[1] Smith *v.* Brady, 17 *N. Y.*, 187; Cunningham *v.* Jones, 20 *id.*, 486; Pullman *v.* Corning, 9 *id.*, 93.

Payment, how made.

§ 630. Payment is made by a transfer[1] of money,[2] or of that which is treated by the parties as equivalent to money,[3] by a debtor[4] in extinction of his debt, to a creditor who accepts it for that purpose.[5]

[1] Eyles *v.* Ellis, 4 *Bing.*, 112; Bolton *v.* Richard, 6 *T. R.*, 139.

[2] See Sweeting *v.* Pierce, 7 *C. B.* (*N. S.*), 480; Bartlett *v.* Pentland, 10 *B. & C.*, 760.

[3] *E. g.*, bank notes, (Hall *v.* Fisher, 9 *Barb.*, 17; Warren *v.* Mains, 7 *Johns.*, 476; Mann *v.* Mann, 1 *Johns. Ch.*, 236;) checks, negotiable paper, &c., treated as money. (Noell *v.* Murray, 13 *N. Y.*, 167; N. Y. State Bank *v.* Fletcher, 5 *Wend.*, 85; Rew *v.* Barber, 3 *Cow.*, 272; see Des Arts *v.* Leggett, 16 *N. Y.*, 582.)

[4] Matthews *v.* Lawrence, 1 *Denio*, 212.

[5] Kingston Bank *v.* Gay, 19 *Barb.*, 460.

Payment by one of several joint debtors.

§ 631. Payment by one of several persons who are jointly liable extinguishes the liability of all of them.

Payment to one of several joint creditors.

§ 632. Payment duly made to one of several joint creditors, extinguishes the debt,[1] except in the case of a deposit made by joint owners who are not partners,[2] which is regulated by the title on DEPOSIT.

[1] Shepard *v.* Ward, 8 *Wend.*, 542.

[2] Husband *v.* Davis, 10 *C. B.*, 650; Innes *v.* Stephenson, 1 *Moo. & R.*, 145.

Payment in manner prescribed by creditor.

§ 633. Payment is complete, and the debt extinguished, upon the debtor's making payment in the manner directed by the creditor, even though the thing paid should never reach the creditor.[1]

[1] Graves *v.* Amer. Exch. Bank, 17 *N. Y.*, 207; Eyles *v.* Ellis, 4 *Bing.*, 112.

Acceptance of payment through a third person.

§ 634. When the obligation of a third person, or an order upon such person, is accepted as payment, the creditor may rescind such acceptance, if the debtor prevents such person from complying with the order,[1] or from ful-

[1] Franklin *v.* Vanderpool, 1 *Hall*, 78; Coyle *v.* Smith, 1 *E. D. Smith*, 400; Purchase *v.* Mattison, 6 *Duer*, 587; Jacks *v.* Darrin, 3 *E. D. Smith*, 567.

filling the obligation, or if, before the creditor can with reasonable diligence reach such person, he becomes insolvent.[1]

[1] Lovett *v.* Cornwell, 6 *Wend.*, 369; aff'g S. C., 1 *Hall*, 56; Timmins *v.* Gibbins, 18 *Q. B.*, 722; Ontario Bank *v.* Lightbody, 13 *Wend.*, 107.

Creditor's retention of thing which he refuses to receive in payment.

§ 635. If anything is given to the creditor in payment, which he refuses to receive as such, he is not bound to return it without demand, but if he retains it, he is a gratuitous depositary thereof.[1]

[1] Kingston Bank *v.* Gay, 19 *Barb.*, 460; Gordon *v.* Strange, 1 *Exch.*, 477.

Liquidated debt not satisfied by payment of a less sum.

§ 636. Payment of an amount less than that of a liquidated[1] debt which is payable,[2] is not a satisfaction thereof, though accepted as such.[3]

[1] Palmerton *v.* Huxford, 4 *Denio*, 166.
[2] Brooks *v.* White, 3 *Metc.*, 286.
[3] Harrison *v.* Wilcox, 2 *John.*, 448; Dederick *v.* Layman, 9 *id.*, 333.
It may well be doubted whether this rule should stand. It is overruled in Pennsylvania, and is certainly harsh and technical.

Application of payments.

§ 637. When a debtor owes several debts to one creditor in the same capacity,[1] a payment, made by the debtor on account of such debts, is applied as follows:

1. If the debtor expressly or impliedly[2] specifies the debts to which such payment shall be applied, it is applied accordingly.[3]

2. If the debtor neglects[4] to make any application, the payment may be applied by the creditor at any time,[5] to any of the debts which are payable when the payment is made;[6] except that if any of the debts consist of interest solely the payment is first applied to such interest.[7]

[1] Goddard *v.* Cox, 2 *Strange*, 1194.
[2] Stone *v.* Seymour, 15 *Wend.*, 19.
[3] Anon., *Cro. Eliz.*, 68; Hall *v.* Constant, 2 *Hall*, 185.
[4] Waller *v.* Lacy, 1 *Man. & Gr.*, 54.
[5] Philpott *v.* Jones, 2 *Ad. & Ellis*, 41; Mills *v.* Fowkes, 5 *Bing. N. C.*, 455; Mayor of Alexandria *v.* Patten, 4 *Cranch*, 317; Allen *v.* Culver, 3 *Denio*, 284.
[6] Niagara Bank *v.* Rosevelt, 9 *Cow.*, 407; Baker *v.* Stackpole, *id.*, 420, 436.
[7] People *v.* New York, 5 *Cow.*, 337.

3. If neither party makes any application, the payment is applied so as most to benefit the creditor.[1]

[1] Amer. Lead. Cas., 147 (1st ed.), note to Mayor of Alexandria v. Patten.

## CHAPTER II.

### OFFER OF PERFORMANCE.

SECTION 638. Extinguishment of obligation by unconditional offer of performance.
639. Debt extinguished by offer to pay, and deposit of money in name of creditor.
640. Offer of payment stops interest.
641. Effect of offer of performance.
642. Offer, how made and received.
643. Actual production of object of obligation unnecessary.
644. Place of offer, when agreed upon.
645. Place of offer not agreed upon.
646. Offer made to one of several joint obligees.
647. Offer prevented by creditor.
648. Effect of creditor's refusal to accept performance before an offer of it.

**Extinguishment of obligation by unconditional offer of performance.**

§ 638. An offer duly made, free from any conditions to which the party to whom it is made has a right to object,[1] to perform an obligation other than for the payment of money, extinguishes the obligation of the person offering at his option.[2]

[1] Bevans v. Rees, 5 *M. & W.*, 306; Wood v. Hitchcock, 20 *Wend.*, 47.

[2] Slingerland v. Morse, 8 *Johns.*, 370; Billings v. Vanderbeck, 23 *Barb.*, 546; Des Arts v. Leggett, 16 *N. Y.*, 582.

**Debt extinguished by offer to pay and deposit of money in name of creditor.**

§ 639. After making such an offer to pay money due, the debtor may, if such offer is refused, deposit the money with any bank of deposit of good repute, within this state, in the name of the creditor. Such deposit is, from the time that notice thereof is given to the creditor, at his risk, and the debt is extinguished to the extent of the sum deposited.[1]

[1] This is substantially from the Louisiana Code. It is plainly just, if not generous, to the creditor. It is not just that the debtor should be forced to retain the money at his own risk.

**Offer of payment stops interest.**

§ 640. In every case, after offer of payment duly made, the debt ceases to bear interest.

Effect of offer of performance.

§ 641. An offer of performance, duly made, has the same effect upon all the incidents and accessories of the obligation, as a performance thereof.[1]

[1] Kortright v. Cady, 21 *N. Y.*, 343; Law v. Jackson, 9 *Cow.*, 641; Raymond v. Bearnard, 12 *Johns.*, 274.

Offer, how made and received.

§ 642. The offer must be made in good faith by the party owing performance to the party who is entitled to the same, and the former must be ready and willing to perform his obligation. But the offer is deemed to be duly made in all respects except on such grounds as are assigned by the creditor for his refusal of the offer at the time,[1] provided he has an opportunity to do so.

[1] See Carman v. Pultz, 21 *N. Y.*, 551.

Actual production of object of obligation unnecessary.

§ 643. An offer of performance is valid without an actual production of the object of the obligation.[1]

[1] This is contrary to the rule of the common law, which requires "a production and manual offer." Bakeman v. Pooler, 15 *Wend.*, 637.

Place of offer when agreed upon.

§ 644. The offer must be made at the place agreed upon for the performance of the obligation.

Place of offer not agreed upon

§ 645. If there is no agreement as to the place of performance, the offer must be made to the creditor in person, if he is within this state; if he is not, it must be made at his residence, if he has one within the state;[1] if he has no such residence, it may be made anywhere within the state.

[1] Smith v. Smith, 2 *Hill*, 351.

Offer made to one of several joint obligees.

§ 646. An offer of performance made to one of several joint obligees, is binding upon all; and a refusal to accept it made by one of them, is binding upon all.[1]

[1] Carman v. Pultz, 21 *N. Y.*, 547.

Offer prevented by creditor.

§ 647. If the debtor is prevented by the creditor from making an offer of performance, it is deemed to be duly made.[1]

[1] Carman v. Pultz, 21 *N. Y.*, 547; Gilmore v. Holt, 4 *Pick.*, 258; Southworth v. Smith, 7 *Cush.*, 391.

Effect of creditor's refusal to accept per-

§ 648. A refusal by the creditor to accept performance, made before any offer thereof, is equivalent to an offer and

refusal, unless before performance is actually due, he gives notice to the debtor of his willingness to accept the same.[1] formance before an offer of it.

[1] North v. Pepper, 21 *Wend.*, 638.

## CHAPTER III.

### PREVENTION OF PERFORMANCE.

SECTION 649. Prevention of performance.
650. Prevention by creditor, by law or by inevitable accident.

§ 649. An obligation is extinguished if the debtor is prevented from performing it: Prevention of performance.

1. By the creditor;

Young v. Hunter, 6 *N. Y.*, 207; Farnham v. Ross, 2 *Hall*, 167; Higgins v. Solomon, *id.*, 482; see Carman v. Pultz, 21 *N. Y.*, 549; Fleming v. Gilbert, 3 *Johns.*, 531; Masterton v. Mayor of Brooklyn, 7 *Hill*, 61.

2. By the operation of law;

Jones v. Judd, 4 *N. Y.*, 411; People v. Bartlett, 3 *Hill*, 570.

3. By inevitable accident.

Wolfe v. Howes, 20 *N. Y.*, 197; Fahy v. North, 19 *Barb.*, 341; People v. Manning, 8 *Cow.*, 297.

§ 650. If performance is prevented by the creditor, the debtor is entitled to all the benefit which he would have obtained by the execution of the contract on both sides.[1] If prevented by law, or by inevitable accident, the debtor is entitled to such proportion of the consideration agreed upon for performance, as is equivalent to the extent of his actual performance. Prevention by creditor, by law or by inevitable accident

[1] Masterton v. Mayor of Brooklyn, 7 *Hill*, 61; see Clark v. Mayor of N. Y., 4 *N. Y.*, 338.

## CHAPTER IV.

### ACCORD AND SATISFACTION.

SECTION 651. Accord defined.
652. Execution of accord alone extinguishes the obligation.
653. Satisfaction defined.
654. Acceptance of debtor's note.

**Accord defined.**

§ 651. An accord is an agreement to accept, in extinguishment of an obligation, something, to which the person agreeing to accept is not otherwise entitled.[1]

[1] Williams *v.* London Com. Co., 10 *Excheq.*, 569.

**Execution of accord alone extinguishes the obligation.**

§ 652. Though the parties to an accord are bound to execute the same,[1] yet it does not extinguish the obligation until it is wholly[2] executed.[3]

[1] Billings *v* Vanderbeck, 23 *Barb.*, 546.
[2] Gabriel *v.* Dresser, 15 *C. B.*, 622.
[3] Day *v.* Roth, 18 *N. Y.*, 456; Russell *v.* Lytle, 6 *Wend.*, 390; Tilton *v.* Alcott, 16 *Barb.*, 598; Mitchell *v.* Hawley, 4 *Denio*, 417.

**Satisfaction defined.**

§ 653. Acceptance of the consideration of an accord by the creditor, extinguishes the obligation, and is called satisfaction.

Hall *v.* Flockton, 16 *Q. B.*, 1039; Jones *v.* Sawkins, 5 *C. B.*, 142.

**Acceptance of debtor's note.**

§ 654. An acceptance of the debtor's promissory note in satisfaction of a liquidated debt which is payable, does not extinguish the debt;[1] but postpones the right of action thereon until the note becomes due.[2]

[1] Cole *v.* Sackett, 1 *Hill*, 516; Hill *v.* Beebe, 13 *N. Y.*, 562; Spencer *v.* Ballou, 18 *N. Y.*, 331.
[2] Myers *v.* Welles, 5 *Hill*, 463.

## CHAPTER V.

### NOVATION.

SECTION 655. Novation defined.
656. Modes of novation.
657. Novation made by contract.
658. Sealed contracts, how modified.

§ 655. Novation is the substitution of a new obligation in place of an existing one. **Novation defined.**

§ 656. It may be made **Modes of novation.**

1. By the substitution of a new obligation between the same parties, with intent to extinguish the old obligation;

2. By the substitution of a new debtor in place of the old one, with intent to release the latter;

3. By the substitution of a new creditor in place of the old one, with intent to transfer the rights of the latter to the former.[1]

[1] Code La., 2185.

§ 657. Novation is made by contract, and is subject to all the rules concerning contracts in general. **Novation made by contract.**

§ 658. A contract under seal cannot be modified, except as to the time of performance,[1] without an agreement under seal,[2] or an executed agreement without seal.[3] **Sealed contracts, how modified.**

[1] Flynn *v.* McKeon, 6 *Duer*, 203; Clark *v.* Dales, 20 *Barb.*, 42; Stone *v.* Sprague, *id.*, 509; Esmond *v.* Van Benschoten, 12 *Barb.*, 366; Fleming *v.* Gilbert, 3 *Johns.*, 528.

[2] Allen *v.* Jaquish, 21 *Wend.*, 628; Delacroix *v.* Bulkley, 13 *id.*, 71. The propriety of this rule is very questionable, inasmuch as it is a pure technicality, which is and must be unfamiliar to ordinary business men.

[3] Pierrepont *v.* Barnard, 6 *N Y.*, 279.

## CHAPTER VI.

### RESCISSION.

SECTION 659. Rescission extinguishes contract.
660. Who may rescind.
661. Rescission by promise.
662. What must be done by rescinding party.
663. Certain stipulations do not defeat right to rescind fraud, &c.

**Rescission extinguishes contract.**

§ 659. A contract is extinguished by its rescission.

**Who may rescind.**

§ 660. Rescission may be made by mutual consent, or any party whose consent to the contract was not real free, or whose consent is for any other reason voidable.[1]

[1] See Nichols *v.* Michael, 23 *N. Y.*, 266; Martin *v.* McC mick, 8 *id.*, 335.

**Rescission by promiser**

§ 661. If the consideration for a promise fails throu the fault of the promisee,[1] in whole or in part,[2] or if becomes wholly[3] void from any cause,[4] the promiser m rescind his contract.

[1] Sherman *v.* White, *How. App. Cas.*, 29; Winter *v.* ] ingston, 13 *Johns.*, 54.

[2] Petry *v.* Christy, 19 *Johns.*, 53; see Duncan *v.* Ed ton, 6 *Bosw.*, 36.

[3] Harmon *v.* Bird, 22 *Wend.*, 113.

[4] Head *v.* Stevens, 19 *Wend.*, 411; Cross *v.* Huntley, *id.*, 386; Putnam *v.* Westcott, 19 *Johns.*, 73; Tap *v.* Van Wagenen, 3 *Johns.*, 465.

**What must be done by rescinding party.**

§ 662. Rescission, when not effected by consent, can accomplished only by the rescinding party using reaso ble diligence[1] to comply with the following rules:

[1] Ladd *v.* Moore, 3 *Sandf.*, 589.

1. He must rescind promptly,[1] upon discovery of the facts,[2]

[1] Fisher v. Fredenhall, 21 *Barb.*, 82; Wheaton v. Baker, 14 *id.*, 597; M'Carty v. Ely, 4 *E. D. Smith*, 375; Rosenbaum v. Gunter, 3 *id.*, 203; Masson v. Bovet, 1 *Denio*, 73; Milner v. Tucker, 1 *Carr. & P.*, 15. But query, in equity?

[2] See same cases.

or upon release from the duress, undue influence,[1] or disability, on account of which he rescinds, if he is aware of his right to rescind;[1]

[1] Wood v. Downes, 18 *Ves.*, 123; Crowe v. Ballard, 3 *Bro. C. C.*, 120; 1 *Ves.*, 214; 2 *Cox*, 253; Gowland v. De Faria, 17 *Ves.*, 20; Morse v. Royal, 12 *id.*, 374; Roche v. O'Brien, 1 *Ball & B.*, 338, 353; Dunbar v. Tredennick, 2 *id.*, 316.

2. He must restore[1] to the other party everything[2] of value[3] which he has received from the latter under the contract,[4] or must offer[5] to restore the same, upon condition that such party shall do likewise, unless the latter is unable,[6] or positively refuses, to do so.

[1] Fisher v. Fredenhall, 21 *Barb.*, 82; Wheaton v. Baker, 14 *id.*, 600; Matteawan Co. v. Bentley, 13 *id.*, 641; Beed v. Blandford, 2 *You. & J.*, 278; Hunt v. Silk, 5 *East.*, 449.

[2] Fisher v. Conant, 3 *E. D. Smith*, 199; see Nichols v. Michael, 23 *N Y.*, 272.

[3] The note of the adverse party is valueless: Nichols v. Michael, 23 *N. Y.*, 267, 273; Nellis v. Bradley, 1 *Sandf.*, 560; and so is the note of an insolvent third person; Hawkins v. Appleby, 2 *Sandf.*, 421.

[4] Colville v. Besly, 2 *Denio*, 139.

[5] Thornton v. Wynn, 12 *Wheat.*, 193; Baker v. Robbins, 2 *Denio*, 136; Hogan v. Weyer, 5 *Hill*, 389.

[6] Masson v. Bovet, 1 *Denio*, 69; Ladd v. Moore, 3 *Sandf.* 589.

Certain stipulations do not defeat right to rescind for fraud, &c.

§ 663. A stipulation that errors of description shall not avoid a contract, or shall be the subject of compensation, or both, does not take away the right of rescission for fraud, nor for mistake, where such mistake is in a matter essential to the inducement of the contract,[1] and is not capable of exact and entire compensation.[2]

[1] Robinson v. Musgrave, 8 *Carr. & P.*, 469; Dobell v. Hutchinson, 3 *Ad. & El.*, 355.

[2] Sherwood v. Robbins, 3 *Carr. & P.*, 339.

## CHAPTER VII.

### RELEASE.

SECTION 664. When obligation is extinguished by release.
665. Release of one does not release another joint-debtor.

When obligation is extinguished by release.

§ 664. An obligation is extinguished by a release therefrom given to the debtor by the creditor, upon a new consideration, or under seal.[1]

[1] This is the law at present. The justice of its restrictions may be doubted.

Release of one does not release another joint debtor

§ 665. A release of one of several joint debtors does not extinguish the obligations of the others.[1]

[1] 3 R. S. (5th ed.), 65; Laws 1838, ch. 257.

## CHAPTER VIII.

### ALTERATION OF INSTRUMENT.

SECTION 666. Effect of alteration of written contract.

Effect of alteration of written contract.

§ 666. The obligation of the debtor on a written contract is extinguished,

1. By a material[1] alteration[2] or a destruction[3] of the instrument wilfully made by the creditor[4] without the consent of the debtor.[5] But if the contract is executed in duplicate, an alteration of one copy only is not deemed an alteration of the contract.[6]

2. By its destruction or cancellation by consent of the parties, for the purpose of extinguishing the obligation.[7]

[1] People *v.* Murry, 1 *Denio*, 239.

[2] Nazro *v.* Fuller, 24 *Wend.*, 374; Chappell *v.* Spencer, 23 *Barb.*, 584; Waring *v.* Smith, 2 *Barb. Ch. R.*, 119; Bruce *v.* Westcott, 3 *Barb.*, 374; Maybee *v.* Sniffen, 2 *E. D. Smith*, 1.

[3] Blade *v.* Noland, 12 *Wend.*, 173.

[4] Ross *v.* Overbaugh, 6 *Cow.*, 746; Malin *v.* Malin, 1 *Wend.*, 659.

[5] Penny *v.* Corwithe, 18 *Johns.*, 499.

[6] Lewis *v.* Payn, 8 *Cow.*, 71; 4 *Wend.*, 426.

[7] Ct. of Errors, Gardner *v.* Gardner, 22 *Wend.*, 526.

# PART II

## OBLIGATIONS ARISING FROM PARTICULAR TRANSACTIONS.


TITLE I. Sale.
II. Exchange.
III. Deposit.
IV. Loan.
V. Loan of Money.
VI. Hire.
VII. Employment and Service.
VIII. Carriage.
IX. Trusts.
X. Agency.
XI. Partnership.
XII. Insurance.
XIII. Commercial Paper.
XIV. Indemnity.
XV. Suretyship.
XVI. Pledge.
XVII. Mortgage.
XVIII. Liens.


## TITLE I.

### SALE.


CHAPTER I. General rules concerning sales and agreements for sale.
II. Sale.
III. Agreements for sale.
IV. Rights and obligations of the seller.
V. Rights and obligations of the buyer.
Stoppage in transit.
auction.

## CHAPTER I.

### GENERAL RULES CONCERNING SALES AND AGREEMENTS FOR SALE.

ARTICLE I. Nature of the contract.
II. Form of the contract.

## ARTICLE I.

### NATURE OF THE CONTRACT.

SECTION 667. Sale defined.
668. Agreements for sale.
669. Agreement to sell.
670. Agreement to buy.
671. Agreement to sell and buy.
672. What is essential to sale.
673. Subject of sale.
674. Price, how fixed.
675. Reasonable price.
676. Mode of ascertaining price, possible or impossible.

**Sale defined**

§ 667. Sale is a contract by which one person, for a pecuniary consideration, called a price, transfers to another his title to the thing sold.

**Agreements for sale.**

§ 668. Agreements for sale are of three kinds:

1. Agreements to sell;
2. Agreements to buy;
3. Mutual agreements to sell and buy.

**Agreement to sell.**

§ 669. An agreement to sell is an agreement by which one person engages to sell certain property to another.

**Agreement to buy.**

§ 670. An agreement to buy, is an agreement by which one person engages to buy certain property of another.

**Agreement to sell and buy.**

§ 671. An agreement to sell and buy, is an agreement by which one person engages to sell certain property to another, who engages to buy the same from him.

**What is essential to sale.**

§ 672. There can be no sale or agreement for sale without a subject of sale, a price, and an agreement of the parties upon the subject, price and sale.[1]

[1] See Cunningham v. Ashbrook, 20 *Mo.*, 556; Boulton v. Jones, 2 *H. & N.*, 564; Schermerhorn v. Talman, 14 *N. Y.*, 117.

§ 673. Property of any description, and any vested right to property, though subject to contingencies, may be sold. But no one can sell a claim against himself.[1]

Subject of sale.

[1] Schermerhorn v. Talman, 14 *N. Y.*, 117; Van Scoter v. Lefferts, 11 *Barb.*, 140.

§ 674. It is not necessary that the contract should specify the price, or any means of ascertaining it,[1] but it may do so. The price may be left to the decision of a third person,[2] or regulated by any standard of value. It cannot be left to the decision of a party to the contract.[3]

Price, how fixed.

[1] Hoadly v. M'Laine, 10 *Bing.*, 487.
[2] Brown v. Bellows, 4 *Pick.*, 189.
[3] See *ibid.*

§ 675. If the contract does not specify any price, the price is so much as the thing sold is reasonably worth.[1]

Reasonable price.

[1] Hoadly v. M'Laine, 10 *Bing.*, 487.

§ 676. If the contract specifies a mode of ascertaining the price which is, on its face, impossible of execution, the contract is void. If it specifies a mode which on its face is possible, but in reality is, or becomes, impossible of execution, it is voidable by either party as soon as such impossibility is ascertained by him.[1]

Mode of ascertaining price, possible or impossible.

[1] Pothier on Sale, n. 24.

## ARTICLE II.

### FORM OF THE CONTRACT.

SECTION 677. What is essential to sale, for price of $50 or more.
678. Transfer of real property.

§ 677. No sale or agreement to sell for a price of fifty dollars or more, is valid unless

What is essential to sale, for price of $50 or more.

1. A memorandum of such contract is made in writing, and subscribed by the parties to be charged thereby, or their lawful agents; or,

2. The buyer receives part of the things sold, or of the evidences thereof, when it consists of things in action; or

3. The buyer at the time of sale pays a part of the price.[1]

[1] 2 R. S., 135.

Transfer of real property.

§ 678. The form of a transfer of real property is described by the chapter on such transfers.

## CHAPTER II.

### SALE.

SECTION 679. Subject of sale.
680. Sale of thing no longer existing.
681. Application of present title to sales.

Subject of sale.

§ 679. The thing sold must be, at the time of the sale, in existence,[1] and capable of identification and immediate delivery.

[1] Couturier *v.* Hastie, 5 *H. of L. Cas.*, 673; 9 *Exch.*, 102; rev'g, 8 *id.*, 40; Strickland *v.* Turner, 7 *Exch.*, 208.

Sale of thing no longer existing.

§ 680. A sale may nevertheless be made of an article that has perished, when the seller is ignorant of the fact, and the buyer agrees to assume the risk of its having perished.[1]

[1] See Couturier *v.* Hastie, *supra.*

Application of present title to sales.

§ 681. All the provisions of this title, except those of the next chapter, apply to sales.

## CHAPTER III.

### AGREEMENTS FOR SALE.

SECTION 682. Agreement void if thing does not exist.
683. Agreement to sell real property.
684. Usual covenants in deeds of grant.
685. Language of usual covenants.
686. Provisions of this title, when applicable.

Agreement void if thing does not exist.

§ 682. In an agreement for sale, the thing to be sold must be defined, but need not be identified, nor be in existence.[1] But an agreement for sale, made upon the

[1] Hale *v.* Rawson, 4 *C. B.* (*N. S.*), 85.

assumption of the existence of a thing, is void, if it does not then exist.[1]

[1] Compare Johnson v. Macdonald, 9 *M. & W.*, 600; Gorrissen v. Perrin, 2 *C. B.* (*N. S.*), 681.

Agreement to sell real property.

§ 683. An agreement to sell real property binds the seller to execute a grant in the form and manner prescribed by the chapter on TRANSFERS OF REAL PROPERTY.

Usual covenants in deeds of grant.

§ 684. An agreement on the part of the seller to give the usual covenants, binds him to execute in the grant, covenants of seisin, quiet enjoyment, further assurance, general warranty, and against incumbrances.

Language of usual covenants.

§ 685. These covenants must be in substance as follows:

"The party of the first part covenants with the party of the second part, that the former is now seised of the said real property in fee simple; that the latter shall enjoy the same without any lawful disturbance; that the same is free from all incumbrances; that the party of the first part, and all persons acquiring any interest in the same through or for him, will, on demand, execute and deliver to the party of the second part, at his expense, any further assurance of the same that may be reasonably required; and that the party of the first part warrants to the party of the second part all the said real property against every person lawfully claiming the same."

Provisions of this title, when applicable.

§ 686. All the provisions of this title, except those of chapter II, apply to agreements to sell and buy; the provisions of sections 689 to 708, inclusive, apply to agreements to sell, and those of sections 687, 688, and 709, to agreements to buy.

## CHAPTER IV.

### RIGHTS AND OBLIGATIONS OF THE SELLER.

ARTICLE I. Deposit until delivery.
II. Delivery.
III. Warranty.

## ARTICLE I.

### DEPOSIT UNTIL DELIVERY.

SECTION 687. Rights and obligations of seller before delivery.
688. When seller may resell.

Rights and obligations of seller before delivery.

§ 687. After the title to the thing sold has passed, and until the delivery is completed, the seller has the rights and obligations of a depositary for hire,[1] except that he must keep the property without charge for a reasonable time.

[1] Sheldon *v.* Skinner, 4 *Wend.*, 529; Lamb *v.* Lathrop, 13 *Wend.*, 97.

When seller may resell.

§ 688. After the lapse of a reasonable time, and after notice given to the buyer, if practicable, to remove the thing sold, and fulfill his other obligations, the seller may, if the buyer does not comply with such notice, re-sell the property on account of the buyer,[1] in the manner in which such property is usually sold,[2] and for the highest price which he can reasonably obtain.

[1] Sands *v.* Taylor, 5 *Johns.*, 395; Bement *v.* Smith, 15 *Wend.*, 497; Bogart *v.* O'Regan, 1 *E. D. Smith*, 590.
[2] Crooks *v.* Moore, 1 *Sandf.*, 297.

## ARTICLE II.

### DELIVERY.

SECTION 689. Delivery on demand. Seller's lien.
690. Delivery, where made.
691. Expense of transportation.
692. Buyer's directions as to manner of sending thing sold.
693. Delivery to be within reasonable hours.

Delivery on demand. Seller's lien

§ 689. The seller must prepare the thing for delivery, within a reasonable time, and deliver it to the buyer on

demand, as soon as it is ready, unless he has a lien thereon. His lien for the price is defined in the chapter on LIENS.

Delivery, where made

§ 690. Unless it is otherwise agreed between the parties, the thing sold, or agreed to be sold, is deliverable at the place at which it is at the time of the sale or agreement to sell, or if it is not at that time in existence, it is deliverable at the place at which it is produced.[1]

[1] Pars. on Cont., 447.

Expense of transportation.

§ 691. The seller must bear the expense of putting the property out of his own building, but further transportation is at the risk[1] and expense of the buyer.

[1] See Bull *v.* Robison, 10 *Exch.*, 342.

Buyer's directions as to manner of sending things sold.

§ 692. If the seller agrees to send the thing sold to the buyer, he must follow the directions of the latter as to the manner of sending, or it will be, during its transportation, at his risk. If he follows such directions, or if, in the absence of special directions, he uses ordinary care in forwarding the property, it is at the risk of the buyer.[1]

[1] Bull *v.* Robison, 10 *Exch.*, 342; Orcutt *v.* Nelson, 1 *Gray*, 536; Jones *v.* Sims, 6 *Porter*, 161.

Delivery to be within reasonable hours.

§ 693. Delivery can only be offered or demanded within reasonable hours of the day.[1]

[1] Startup *v.* Macdonald, 2 *M. & G.*, 395.

## ARTICLE III.

### WARRANTY.

SECTION 694. No implied warranty upon sale of real property.
695. Warranty of title upon agreement to sell.
696. Warranty of title to personal property.
697. Warranty on sale by sample.
698. When seller knows that buyer relies on his statements, &c.
699. Manufacturer's warranty against latent defects.
700. Warranty of provisions for domestic use.
701. Thing bought for particular purpose.
702. When thing cannot be examined by buyer.
703. Warranty of thing in action.
704. Warranty upon judicial sale.
705. No implied warranty in mere contract of sale.
706. Waiver of warranties but not of fraud.

**No implied warranty upon sale of real property.**

§ 694. No warranty is implied from the mere sale of real property,[1] whether the transfer contains express covenants or not.

[1] Huntly *v.* Waddell, 12 *Ired. Law* (*N. C.*), 32; 1 R. S., 738.

**Warranty of title upon agreement to sell.**

§ 695. One who agrees to sell real property, thereby engages only to execute a transfer without covenants.[1]

[1] This may be different from the present rule, but it seems absurd, that more should be implied in an agreement to sell than in the sale itself. And, even now, the purchaser can only recover nominal damages (Conger *v.* Weaver, 20 *N. Y.*, 140; Peters *v.* McKeon, 4 *Denio*, 546), unless the vendor was guilty of fraud, or purposely disabled himself from giving title (Trull *v.* Granger, 8 *N. Y.*, 115).

**Warranty of title to personal property.**

§ 696. One who sells or agrees to sell personal property, as his own, thereby warrants that he has a good title thereto.[1]

[1] Defreeze *v.* Trumper, 1 *Johns.*, 274; followed Reid *v.* Barber, 3 *Cow.*, 272; and see Hoe *v.* Sanborn, 21 *N. Y.*, 555. Whether this warranty is implied, where the property is not in possession of the vendor, is in dispute. It is held that it is not, in M'Coy *v.* Archer, 3 *Barb.*, 323; Huntington *v.* Hall, 36 *Me.*, 501; that it is, in Smith *v.* Fairbanks, 7 *Foster*, 521; see Strong *v.* Barnes, 11 *Vt.*, 221.

§ 697. One who sells or agrees to sell goods by sample, thereby warrants the bulk to be equal to the sample.[1]

Warranty on sale by sample.

[1] Waring *v.* Mason, 18 *Wend.*, 425; see Beirne *v.* Dord, 5 *N. Y.*, 95; Hargous *v.* Stone, *id.*, 73.

§ 698. One who sells property of any kind, knowing that the buyer relies upon his statements or his judgment, thereby warrants to such buyer that neither he, nor any agent employed by him in the transaction, knows the existence of any fact concerning the thing sold which would, to his knowledge, destroy the buyer's inducement to buy.[1]

When seller knows that buyer relies on his statements, &c.

[1] It is utterly impossible to reconcile the cases on this subject. This rule is perhaps as near their result as any that could be stated in as few words. See Hoe *v.* Sanborn, 21 *N. Y.*, 552; 1 Pars. Cont., 461; 2 Kent Com., 480.

§ 699. One who sells an article of his own manufacture, thereby warrants it to be free from any latent defect, not disclosed to the buyer, arising from the process of manufacture, and also that neither he nor his agents in such manufacture have knowingly used improper materials therein.[1]

Manufacturer's warranty against latent defects

[1] Hoe *v.* Sanborn, 21 *N. Y.*, 552, 566.

§ 700. One who sells provisions for domestic use thereby warrants, to one who buys for actual consumption, and not for the purpose of sale, that they are sound and wholesome.[1]

Warranty for provisions for domestic use.

[1] Van Bracklin *v.* Fonda, 12 *Johns.*, 468; as limited in Moses *v.* Mead, 1 *Denio*, 378; 5 *id.*, 617. It is still further limited in Burnby *v.* Bollett, 16 *M. & W.*, 644.

§ 701. One who manufactures an article under an order for a particular purpose, warrants by the sale that it is reasonably fit for that purpose.[1]

Thing bought for particular purpose.

[1] Brown *v.* Edgington, 2 *M. & G.*, 279; Shepherd *v.* Pybus, 3 *id.*, 868; Howard *v.* Hoey, 23 *Wend.*, 351; see Hoe *v.* Sanborn, 21 *N. Y.*, 552.

§ 702. When the thing sold is inaccessible to the examination of the buyer, the seller warrants by the sale that it is sound and merchantable.[1]

When thing can not be examined by buyer.

[1] Wieler *v.* Schilizzi, 17 *C. B.*, 619.

Validity of thing in action.

§ 703. The seller of a thing in action warrants by the sale that it is valid and binding, according to its purport.[1]

[1] Furniss *v.* Ferguson, 15 *N. Y.*, 437; Delaware Bank *v.* Jarvis, 20 *N. Y.*, 226. This rule may be a little too broad.

Warranty upon judicial sale.

§ 704. Upon a judicial sale,[1] the only warranty implied is that the seller does not know that the sale will not pass a good title to the property.[2]

[1] The Monte Allegre, 9 *Wheat.*, 644; Morgan *v.* Fencher, 1 *Blackf.*, 10; Bashore *v.* Whisler, 3 *Watts*, 490.
[2] Peto *v.* Blades, 5 *Taunt.*, 657.

No implied warranty in mere contract of sale

§ 705. Except in the cases herein mentioned, the mere contract of sale or agreement to sell implies no warranty.[1]

[1] Beirne *v.* Dord, 5 *N. Y.*, 98.

Waiver of warranties, but not of fraud.

§ 706. The parties may dispense with all warranties, but cannot waive fraud before it is discovered.

## CHAPTER V.

### RIGHTS AND OBLIGATIONS OF THE BUYER.

SECTION 707. Title acquired by buyer.
708. Buyer in good faith protected in certain cases.
709. Price, when to be paid.

Title acquired by buyer.

§ 707. A sale vests in the buyer all the real title of the seller, and, except in the cases mentioned in section 708, no more.

Wheelwright *v.* De Peyster, 1 *Johns.*, 471.

Buyer in good faith protected in certain cases.

§ 708. Where the owner of personal property confers upon another the apparent right of property or of disposal, a buyer from such other in good faith and for value by an executed sale in the ordinary course of business, is entitled thereto even as against the original owner.

Fassett *v.* Smith, 23 *N. Y.*, 252; Saltus *v.* Everett, 20 *Wend.*, 267; Brower *v.* Peabody, 13 *N. Y.*, 121; Beavers *v.* Lane, 6 *Duer*, 232.

Price, when to be paid.

§ 709. Unless the parties otherwise agree, the buyer must pay the price on the delivery of the thing;[1] and must take it away within a reasonable time after the seller offers to deliver it.

[1] Tipton *v.* Feitner, 20 *N. Y.*, 423.

## CHAPTER VI.

### STOPPAGE IN TRANSIT.

SECTION 710. When seller may stop goods.
711. What is insolvency of consignee.
712. Transit, when ended.
713. Stoppage, how effected.
714. Effect of stoppage.

**When seller may stop goods.**

§ 710. The seller or consignor[1] of a thing, whose claim for its price has not been extinguished,[2] may, upon the insolvency of the consignee becoming known to him[3] after parting with the thing, stop it while on its transit to the buyer, and resume possession thereof.

[1] See Siffken *v.* Wray, 6 *East*, 371; Feise *v.* Wray, 3 *id.*, 93, Sweet *v.* Pyne, 1 *id.*, 4.
[2] Feise *v.* Wray, 3 *East*, 93; Jenkins *v.* Usborne, 7 *M. & G.*, 698.
[3] Rogers *v.* Thomas, 20 *Conn.*, 53, slightly modified.

**What is insolvency of consignee.**

§ 711. A person is insolvent, within the meaning of the last section, when he ceases to pay his debts in the manner usual with persons of his business, or declares his inability or unwillingness to do so.

Rogers *v.* Thomas, 20 *Conn.*, 53; Hays *v.* Mouille, 14 *Penn.*, 51.

**Transit, when ended**

§ 712. The transit is at an end when the thing comes into the actual or constructive possession of the consignee,[1] or into that of his agent, unless such agent is employed merely to forward the thing to the consignee.[2]

[1] Mottram *v.* Heyer, 5 *Denio*, 629; 1 *id.*, 483; Cowasjee *v.* Thompson, 5 *Moore P. C.*, 165.
[2] Harris *v.* Pratt, 17 *N. Y.*, 249.

**Stoppage, how effected.**

§ 713. Stoppage in transit can be effected only by notice to the carrier or depositary of the thing, or by taking actual possession thereof.

Mottram *v.* Heyer, 5 *Denio*, 629; Whitehead *v.* Anderson, 9 *M. & W.*, 518.

**Effect of stoppage.**

§ 714. Stoppage in transit does not of itself rescind a sale, but is a means of enforcing the seller's lien.

Pars. Cont., 479.

## CHAPTER VII.

### SALE BY AUCTION.

SECTION 715. Sale by auction defined.
716. Sale, when complete; withdrawal of bid.
717. Sale under written conditions.
718. Rights of buyer upon sale without reserve.
719. By-bidding.
720. Auctioneer's memorandum of sale.

Sale, by auction, defined.

§ 715. Sale by auction is made by publicly offering the thing to be sold to the highest bidder.

Sale, when complete.

Withdrawal of bid.

§ 716. The sale is complete when the auctioneer publicly announces, by the fall of his hammer or in any other customary manner, that the thing is sold. Until such announcement, any bidder may withdraw his bid,[1] if he does so in a manner reasonably sufficient to bring it to the notice of the auctioneer.[2]

[1] Payne *v.* Cave, 3 *T. R.*, 148.
[2] Jones *v.* Nanney, 11 *Price*, 103; *M'Clel.*, 39.

Sale under written conditions.

§ 717. If the sale is made upon written or printed conditions, such conditions cannot be modified by the oral declarations of the auctioneer.

Shelton *v.* Livius, 2 *Cr. & J.*, 411; Bradshaw *v.* Bennett, 5 *Car. & P.*, 48; Powell *v.* Edmunds, 12 *East*, 6.

Rights of buyer upon sale without reserve.

§ 718. If the auctioneer, having authority to do so, has publicly announced that the sale will be without reserve, or has made any announcement equivalent thereto, the highest bidder in good faith has an absolute right to the completion of the sale to him; and upon such a sale, bids by the seller or any agent for him are void.

Warlow *v.* Harrison, 6 *Jur.* [*N. S.*], 66; 29 *L. J.* [*Q. B.*], 14.

By-bidding.

§ 719. If any person is employed by the seller to bid at the sale, without an intention on his part to buy, or on the

part of the seller to enforce his bid,[1] and the fact of such employment is not communicated to the buyer, he may rescind his purchase.

[1] Crowder *v.* Austin, 3 *Bing.*, 368; Rex *v.* Marsh, 3 *Y. & J.*, 331; Howard *v.* Castle, 6 *T. R.*, 642; Wheeler *v.* Collier, *Moo. & M.*, 126; Baham *v.* Bach, 13 *La.*, 287; Moncrieff *v.* Goldsborough 4 *Harr. & McH.*, 282; Donaldson *v.* M'Roy, 1 *P. A. Browne*, 346; Thornett *v.* Haines, 15 *M. & W.*, 371. But see Woodward *v.* Miller, 2 *Colly.*, 279; Bramley *v.* Alt, 3 *Ves.*, 619, *n.*; Smith *v.* Clarke, 12 *Ves.*, 477. The rule is sustained in all its stringency, by Kent (2 Kent Com., 539).

**Auctioneer's memorandum of sale.**

§ 720. When property is sold by auction, the auctioneer, his partner or clerk, may enter in a sale book, at the time of the sale, a memorandum specifying the name of the person for whom he sells, the nature of the thing sold, the price, the terms of sale, and the name of the buyer. A memorandum thus made binds both the parties in the same manner as if made by themselves.

2 R. S., 136, modified in form, but not in effect.

# TITLE II.

## EXCHANGE.

SECTION 721. Exchange defined.
722. Parties have rights and obligations of sellers and buyers.
723. Thing of value of $50 or more.
724. Value to be paid upon failure to deliver thing.

**Exchange defined.**

§ 721. Exchange is a contract by which the parties mutually give one thing for another, neither thing being money only.

**Parties have rights and obligations of sellers and buyers.**

§ 722. The provisions of the title on SALE apply to exchanges. Each party has the rights and obligations of a seller as to the thing which he gives, and of a buyer as to that which he takes.

**Thing of value of $50 or more.**

§ 723. The provisions of § 677 apply to all exchanges in which the value of the thing given by either party is fifty dollars or more.

Value to be paid upon failure to deliver thing.

§ 724. If either party is unable to deliver the thing which he agreed to deliver, he must pay its value to the other party.

# TITLE III.

## DEPOSIT.

CHAPTER I. Deposit in general.
II. Gratuitous deposit.
III. Storage.
IV. Finding.

## CHAPTER I.

### DEPOSIT IN GENERAL.

ARTICLE I. Nature and creation of deposit.
II. Obligations of the depositor.
III. Obligations of the depositary.

## ARTICLE I.

### NATURE AND CREATION OF DEPOSIT.

SECTION 725. Deposit, kinds of.
726. Voluntary deposit, how made.
727. Involuntary deposit, how made.

Deposit, kinds of.

§ 725. Deposit is,

1. Voluntary, or,
2. Involuntary.

Voluntary deposits, how made.

§ 726. A voluntary deposit is made by one giving to another, with his consent, the possession of a thing to keep for the benefit of the former. The former is called the depositor, and the latter the depositary.

Involuntary deposit, how made.

§ 727. An involuntary deposit is made:

1. By the accidental casting of a thing into the possession of any person, without negligence on the part of its owner;

2. In cases of fire, shipwreck, inundation, insurrection, riot, or like extraordinary emergencies, by the owner of a

thing committing it, out of necessity, to the care of any person.

The person with whom a thing is thus deposited, is bound to receive it.

## ARTICLE II.

### OBLIGATIONS OF THE DEPOSITOR.

SECTION 728. Depositor must indemnify depositary.

§ 728. The depositor must indemnify the depositary

Depositor must indemnify depositary.

1. For all damage caused to him by the defects or vices of the thing;[1]

2. For all expenses necessarily incurred by him about the thing, other than such as are involved in the nature of the undertaking.

[1] Code La., 2931; Code Napoleon, 1947.

## ARTICLE III.

### OBLIGATIONS OF THE DEPOSITARY.

SECTION 729. Obligations of depositary of animals.
730. Obligations as to use of thing deposited.
731. Liability for damage arising from wrongful use.
732. Depositary of thing wrongfully detained from owner.
733. Sale of thing in danger of perishing.
734. Injury to or loss of thing deposited.
735. Thing deposited to be delivered with its increase.
736. No obligation to deliver without demand.
737. Place of delivery.
738. Delivery of thing owned jointly, &c.
739. Service rendered by depositary.
740. Extent of his liability for negligence.

§ 729. The depositary of animals must provide them with suitable food and shelter, and treat them kindly.

Obligation of depositary of animals.

§ 730. He may not make or permit any use of the thing deposited, without the consent of the depositor.[1] He may not open it, if it is purposely fastened by the depositor, without the consent of the latter, except in case of necessity.[2]

Obligations as to use of thing deposited.

[1] Story on Bailm., § 89; Code of La., 2911.
[2] Story on Bailm., § 92; Code of La., 2914.

Liability for damage arising from wrongful use.

§ 731. The depositary is liable absolutely for any damage happening to the thing deposited during his wrongful use thereof, unless such damage must inevitably have happened though the property had not been so used.[1]

[1] Story on Bailm., §§ 413 to 413 *d*.

Depositary of thing wrongfully detained from owner

§ 732. A depositary who knows or believes that the thing deposited is wrongfully detained from its real owner, must give him notice thereof. If within a reasonable time such owner does not claim it, the depository is exonerated from liability to him, on returning it to the depositor.[1]

[1] Code of La., 2931; Story Bailm., §§ 102, 108.

Sale of thing in danger of perishing.

§ 733. If the thing deposited is in actual danger of perishing before instructions can be obtained from the depositor, the depositary may sell it for the best price obtainable, and retain the proceeds as a deposit.[1] He must give immediate notice of his proceedings to the depositor.

[1] Story on Bailm., § 97.

Injury to or loss of thing deposited.

§ 734. If a thing is injured or lost during its deposit, and the depositary refuses to inform the depositor of the circumstances under which the injury or loss occurred, or wilfully misrepresents the circumstances to him, the depositary is presumed to have permitted the injury or loss to occur wilfully or by gross negligence.

Thing deposited to be delivered with its increase.

§ 735. The depositary, unless he has a lien thereon, must deliver the thing deposited, with all its increase or proceeds, to the depositor, on demand.

No obligation to deliver without demand.

§ 736. The depositary is not bound to deliver the thing without demand,[1] even where the deposit is for a specified time, unless he has agreed to do so, or has agreed to deliver it to a third person.

[1] Phelps *v.* Bostwick, 22 *Barb.*, 314.

Place of delivery.

§ 737. In the absence of an agreement on the subject, the depositary must deliver the thing at his residence or place of business.

Delivery of thing owned jointly, &c.

§ 738. If the thing deposited is owned jointly or in common by persons who cannot agree upon the manner of its

delivery, the depositary must deliver to each his proper share thereof, if it can be done without injury to the thing.

Service rendered by depositary.

§ 739. So far as any service is rendered by the depositary, or required from him, his duties and liabilities are prescribed by the chapter on EMPLOYMENT AND SERVICE.

Extent of his liability for negligence.

§ 740. The liability of the depositary for negligence is imited to the amount which he has reason to suppose the thing deposited to be worth.[1]

[1] See Story on Bailm., § 77.

## CHAPTER II.

### GRATUITOUS DEPOSIT.

SECTION 741. Gratuitous deposit defined.
742. Involuntary deposit.
743. Degree of care required of gratuitous depositary.
744. When his duties cease.

Gratuitous deposits defined.

§ 741. Gratuitous deposit is a deposit for which the depositary receives no consideration beyond the mere possession of the thing.

Involuntary deposit.

§ 742. An involuntary deposit is gratuitous, the depositary being entitled to no reward.

Degree of care required of gratuitous depositary.

§ 743. A gratuitous depositary must use at least slight care for the preservation of the thing.

His duties cease, when.

§ 744. His duties cease

1. Upon his restoring the thing deposited to its owner; or

2. Upon his giving reasonable notice to the owner to remove it, and the owner failing to do so within a reasonable time.[1] But an involuntary depositary, under subdivision 2 of section 727, cannot give such notice until the emergency which gave rise to the deposit is past.

[1] Roulston v. McClelland, 2 *E. D. Smith*, 60.

## CHAPTER III.

### STORAGE.

SECTION 745. Depositary for hire. Storage.
746. Degree of care required of depositary for hire.
747. Rate of compensation for fraction of a week, &c.
748. Termination of deposit by depositary or depositor.

Depositary for hire. Storage.

§ 745. A deposit not gratuitous is called storage. The depositary in such case is called a depositary for hire.

Degree of care required of depositary for hire.

§ 746. A depositary for hire must use ordinary care for the preservation of the thing.

Rate of compensation for fraction of a week, &c.

§ 747. In the absence of an agreement on the subject, the depositor of animals must pay one week's hire for their sustenance and shelter during any fraction of a week, and the depositor of other property must pay half a month's hire for any fraction of a half month.

Termination of deposit.

§ 748. In the absence of any agreement as to the length of time during which the deposit is to continue, it may be terminated by the depositor at any time, and by the depositary upon reasonable notice.

## CHAPTER IV.

### FINDING.

SECTION 749. Obligation of finder of a thing.
750. To notify owner.
751. Claimant to prove ownership.
752. Reward, &c., to finder.
753. He may put thing found in storage.
754. When finder may sell the thing found.
755. How sale is to be made.
756. Surrender of thing to the finder.

Obligation of finder of

§ 749. A person finding a thing lost, is not bound to take charge of it, but if he does so, he is thenceforward a

depositary for the owner, with the rights and obligations of a depositary for hire.[1]

finder of a thing.

[1] This section, and the ensuing ones, differ materially from the common law, under which the finder is a gratuitous depositary. Judge STORY considered the law in this respect to be unsatisfactory, and we have altered it, giving the finder a reward, and holding him to a corresponding accountability. This is more just to both parties.

To notify owner.

§ 750. If he knows or suspects who is the owner, the finder must, with reasonable diligence, give him notice of the finding; and if he fails to do so, he is liable in damages to the owner, and has no claim to any reward offered by him for the recovery of the thing, or to any compensation for his trouble or expenses.

Claimant to prove ownership.

§ 751. He has a right to require reasonable proof of ownership from any person claiming the thing.

Reward, &c., to finder.

§ 752. He is entitled to compensation for all expenses necessarily incurred by him for the preservation of the thing, and to a reasonable reward for keeping it, and for any other service necessarily performed by him about the same.

He may put things found on storage.

§ 753. He may exonerate himself from liability at any time, by placing the thing on storage with any responsible person of good character, at a reasonable expense.[1]

[1] It does not seem just to compel the finder to keep the property in his own charge. On the other hand, he should not be allowed to put the loser to unnecessary expense.

When finder may sell the thing found.

§ 754. The finder may sell the thing found, if it is a thing which is commonly the subject of sale, when the owner cannot with reasonable diligence be found, or being found, refuses upon demand to pay the lawful charges of the finder, in the following cases:

1. When the thing is in danger of perishing, or losing the greater part of its value;

2. When the lawful charges of the finder amount to two-thirds of its value.

How sale is to be made.

§ 755. Such sale must be made upon reasonable notice to the owner, if he can be found, of the time and place of sale. It must be made in the most usual manner, and for the highest price obtainable. The finder cannot himself be the purchaser.

Surrender of thing to the finder.

§ 756. The owner of the thing exonerates himself from the claims of the finder by surrendering it to him in satisfaction thereof.

# TITLE IV.

## LOAN.

CHAPTER I. Loan for use.
II. Loan for exchange.

## CHAPTER I.

### LOAN FOR USE.

SECTION 757. Loan, what.
758. Property of thing.
759. Care required of borrowers.
760. Use of thing lent.
761. Borrower, to repair injuries, when.
762. To bear expenses, when.
763. Lender liable for defects.
764. Lender may require return of thing lent.
765. When returnable without demand.
766. Place of return.

Loan, what.

§ 757. A loan for use is a contract by which one gives to another, without reward, the temporary possession and use of a thing, and the latter agrees to return the same to him at a future time. A loan for reward is called a hiring.

Property of thing.

§ 758. A loan for use does not transfer the title to the thing.

Care required of borrowers.

§ 759. The borrower must use great care for the preservation of the thing lent in safety and in good condition.[1] If the thing lent is a living creature, he must also use it with great kindness, and provide everything suitable and necessary for it. He is bound to have and exercise

such skill in the care of the thing as he causes the lender to believe him to possess.[2]

[1] Scranton v. Baxter, 4 *Sandf.*, 5.
[2] Story on Bailm., § 237.

Use of thing lent.

§ 760. He may use the thing lent for such purposes only as the lender might reasonably anticipate at the time of lending.[1] He must not part with it to a third person, without the consent of the lender.[2]

[1] Story on Bailm., § 232.
[2] Id., § 234; Esmay v. Fanning, 9 *Barb.*, 176; 5 *How. Pr.*, 228.

Borrower to repair injuries, when.

§ 761. The borrower must repair all deteriorations or injuries to the thing, which are occasioned by his negligence, however slight.

To bear expenses, when.

§ 762. The borrower must bear all expenses concerning the thing during the loan, except such as are necessarily incurred by him to preserve it from unsuspected and unusual injury. For such expenses he is entitled to compensation from the lender, who may however exonerate himself by surrendering the thing to the borrower.

See Story on Bailm., § 273.

Lender liable for defects.

§ 763. The lender must indemnify the borrower for any damage caused by defects or vices in the thing, which he knew at the time of lending, and concealed from the borrower.

Story on Bailm., § 275; approved, Blakemore v. Bristol and Exeter Railway Co., 8 *Ell. & Bl.*, 1051.

Lender may require return of thing lent.

§ 764. The lender may at any time require the return of the thing, even though he agrees to lend it for a specified time or purpose.[1] But if on the faith of such agreement the borrower makes such arrangements that a return of the thing before the period agreed upon would cause him actual loss, exceeding the benefit derived by him from the loan, the lender must indemnify him for such loss, if he compels such return, the borrower not having violated his duty in any manner.[2]

[1] Edw. on Bailm., 143.
[2] Story on Bailm., § 258.

When returnable without demand.

§ 765. If the thing is lent for a specified time or purpose, it must be returned to the lender without demand, as soon as the time has expired, or the purpose has been accomplished. In other cases it need not be returned until demanded.

Place of return.

§ 766. The borrower must return the thing to the lender at the place contemplated by the parties at the time of lending; or if no particular place was so contemplated by them, at the place where it was at that time.

## CHAPTER III.

### LOAN FOR EXCHANGE.

SECTION 767. Loan for exchange, what.
768. Property of thing.
769. Contract cannot be modified by lender.
770. Certain sections applicable.

Loan for exchange, what.

§ 767. Loan for exchange is a contract by which one agrees to deliver a thing to another, and the latter agrees to return a similar thing to the former at a future time.

Property of thing.

§ 768. By such loan the title to the thing is transferred to the borrower.

Contract cannot be modified by lender.

§ 769. The lender cannot require the borrower to fulfill his obligations at a time, or in a manner, different from that which was originally agreed upon.

Certain sections applicable.

§ 770. Sections 724, 763 and 766, apply to a loan for exchange.

# TITLE V.

## LOAN OF MONEY

SECTION 771. Loan of money.
772. Loan to be repaid in current coin.
773. Interest defined.
774. When interest is payable.
775. Annual rate.
776, 777. Legal interest.
778. Deduction of amount of interest in advance.
779. Recovery of amount exceeding legal interest.
780. Reservation of illegal interest renders contract void.
781. Rights of borrower under contract reserving illegal interest.
782. Cure of usury.
783. Subsequent usury.

Loan of money.

§ 771. A loan of money is a contract by which one agrees to deliver a sum of money to another, and the latter agrees to return a sum equivalent to that which he borrowed, with or without interest, at a future time. A loan for mere use is governed by the chapter on LOAN FOR USE.

Loan to be repaid in current coin.

§ 772. The borrower must pay the amount due in such coin as is current at the time when the loan becomes due, whether such coin is worth more or less than the actual money lent.

Code of La., 2884.

Interest defined.

§ 773. Compensation for the loan, forbearance, or use of money, or its equivalent, is called interest.

When interest is payable.

§ 774. In the absence of any agreement upon the subject, a loan of money bears interest from the time it is made.

Gillet *v.* Van Rensselaer, 15 *N. Y.*, 397.

Annual rate.

§ 775. When a rate of interest is prescribed by a law or contract, without specifying the period of time by which such rate is to be calculated, it is deemed an annual rate.

1 R. S., 773.

Legal interest.

§ 776. Under an agreement or obligation to pay interest, no rate of interest being specified by the parties, interest

is payable at the rate of seven one-hundredths of the principal for one year, and in the like proportion for a longer or shorter time;[1] but in the computation of interest for less than a year, three hundred and sixty days are deemed to constitute a year.[2]

[1] 1 R. S., 771.
[2] 1 R. S., 773.

Legal interest.

§ 777. No greater interest than is allowed by the last section may be taken,[1] except from a state or corporation.[2]

[1] 1 R. S., 772.
[2] Curtis *v.* Leavitt, 15 *N. Y.*, 9.

Deduction of amount of interest in advance.

§ 778. The interest which would become due at the end of the term for which the principal is lent, not exceeding one year's interest in all, may be deducted from the loan in advance,[1] if the parties so agree.

[1] Marvine *v.* Hymers, 12 *N. Y.*, 227. Perhaps the term should be less than a year under this decision.

Recovery of amount exceeding legal interest.

§ 779. When a greater rate of interest has been paid than is allowed by sections 776, 777 and 778, the person paying it may recover the excess from the person taking it.[1]

1 R. S., 772.

Reservation of illegal interest renders contract void.

§ 780. Every contract by which the lender of money intentionally[1] takes or reserves to himself a greater rate of interest than is allowed by sections 776, 777, and 778, is void

[1] Marvine *v.* Hymers, 12 *N. Y.*, 231.

Rights of borrower under contract reserving illegal interest.

§ 781. The borrower under such a contract is entitled to recover from the lender all that he paid to him under the same, without restoring anything received by him from the lender,[1] or paying anything to the lender.[2]

[1] 1 R. S., 772, 773.
[2] Laws 1837, ch. 430.

Cure of usury.

§ 782. A usurious contract may be made valid by an express remission of the usury by the creditor in good faith before the debt is due.

Subsequent usury

§ 783. A loan on lawful interest is not avoided by a subsequent agreement to pay usury, but the latter agreement alone is void.

# TITLE VI.

## HIRE.

CHAPTER I. Hiring in general.
II. Hiring of real property.
III. Hiring of personal property.

## CHAPTER I.

### HIRING IN GENERAL.

SECTION 784. Hiring defined.
785. Property of thing.
786. Products of thing.
787. Degree of care, &c., on part of hirer.
788. Must repair injuries, &c.
789. Thing let for a particular purpose.
790. Compensation.
791. When letter may terminate the hiring.
792. When hirer may terminate the hiring.
793. When hiring terminates.
794. When terminated by death, &c., of party.
795. Apportionment of hire.

Hiring defined.

§ 784. Hiring is a contract by which one gives to another the temporary possession and use of a thing, for reward, and the latter agrees to return the same to the former at a future time.

Property of thing.

§ 785. Hiring does not transfer the title to the thing hired, but the hirer has a special property in its possession during the term of hiring.

Roberts *v.* Wyatt, 2 *Taunt.*, 268.

Products of thing.

§ 786. The product of the thing hired, during the hiring, belongs to the hirer.

Putnam *v.* Wyley, 8 *Johns.*, 435.

Degree of care, &c., on part of hirer

§ 787. The hirer must use ordinary care for the preservation of the thing hired in safety and in good condition.

Must repair injuries, &c.

§ 788. He must repair all deteriorations or injuries to the thing hired, occasioned by his ordinary negligence.

Thing let for a particular purpose.

§ 789. When a thing is let for a particular purpose, the hirer may not use it for any other purpose.

Fish *v.* Ferris, 5 *Duer*, 49; Story Bailm., § 43.

Compensation.

§ 790. If no specific compensation is agreed upon between the parties for the use of the thing hired, the hirer must pay the other a reasonable reward.

When letter may terminate the hiring.

§ 791. The person letting may terminate the hiring, and reclaim the thing hired, before the end of the term agreed upon, in the following cases:

1. When the hirer uses, or permits a use of the thing hired, in a manner contrary to the agreement of the parties;

2. When the hirer, being requested so to do, does not within a reasonable time make such repairs as he is bound to make.

When hirer may terminate the hiring.

§ 792. The hirer may terminate the hiring before the end of the term agreed upon:

1. When the person letting being requested, does not within a reasonable time fulfill his obligations, if any, as to placing and securing the hirer in the quiet possession of the thing hired, or putting it into good condition, or repairing;

2. When the greater part of the thing hired, or that part which was, and which the person letting had, at the time of hiring, reason to believe was, the material inducement to the hirer to enter into the contract, perishes from any other cause than the ordinary negligence of such hirer.

When hiring terminates.

§ 793. The hiring terminates:

1. At the end of the term agreed upon;

2. By the mutual consent of the parties;

3. By the hirer acquiring a title to the thing hired, superior to that of the person letting;

4. By the destruction of the thing hired.

When terminated by death, &c., of party.

§ 794. The hiring, if terminable at the pleasure of one of the parties, is terminated by notice to the other of his death or incapacity to contract. In other cases, it is not terminated thereby, unless it is so agreed.

Story Bailm., § 419.

§ 795. When the hiring is terminated before the time originally agreed upon, the hirer must pay the due proportion of the hire for such use as he has actually made of the thing, unless such use is merely nominal, and of no benefit to him. Apportionment of hire

Modified from Story on Bailm., § 418, 418 a.

## CHAPTER II.

### HIRING OF REAL PROPERTY

SECTION 796. Form, &c., of lease.
797. Lessor to make dwelling-house fit for its purpose.
798. When lessee may make repairs, &c.
799. Term of hiring when no limit is fixed.
800. Hiring of lodgings for indefinite term.
801. Rent, where payable.
802. Rent, when payable.
803. Lease of agricultural land limited to twelve years.
804. Renewal of lease by lessee's continued possession.

§ 796. The form and effect of a lease of real property are defined in the chapter on TRANSFERS OF REAL PROPERTY. Form, &c., of lease.

§ 797. In the absence of a different agreement, the lessor of a building intended for the occupation of human beings must put it into a condition fit for that purpose, and must repair all subsequent dilapidation thereof, except such as are mentioned in section 788. Lessor to make dwelling-house fit for its purpose.

This section changes the rule upon this subject to conform to that which, notwithstanding steady judicial adherence for hundreds of years to the adverse doctrine, is generally believed by the unprofessional public to be law, and upon which basis they almost always contract. The very fact that there are repeated decisions to the contrary, down to the year 1861, shows that the public do not and cannot understand their justice, or even realize their existence. So familiar a point of law could not rise again and again for adjudication, were it not that the community at large revolt at every application of the rule. A partial reform has been effected by the legislature, in suspending the rent of houses destroyed or injured, in certain cases (Laws 1860, ch. 345), which ought to be carried still further.

§ 798. If, within a reasonable time after notice to the lessor of dilapidations which he ought to repair, he neglects When lessee may

make repairs, &c.

to do so, the lessee may repair the same himself, and deduct the expense of such repairs from the rent.

Term of hiring when no limit is fixed.

§ 799. A hiring of real property, other than lodgings, is deemed, in the absence of an agreement between the parties upon the subject, to extend to the next day upon which it is the custom of the place to make annual hirings of real property. In the cities of New York and Brooklyn, that day is the first of May. In places where there is no custom on the subject, such a hiring is presumed to be for one year from its commencement.

The most of the section is new. So far as relates to New York, it is from 1 R. S., 744.

Hiring of lodgings for indefinite term.

§ 800. A hiring of lodgings for an unspecified term is presumed to have been made for such length of time as the parties adopt for the estimation of the rent. Thus a hiring at a weekly rate of rent is presumed to be for one week.[1]

[1] Code Napoleon, 1758.

Rent, where payable.

§ 801. Rent of inhabited land occupied for habitation, is payable on the land.[1] In other cases it is payable to the lessor wherever he may be found.

[1] This is contrary to the general rule in England. Haldane *v.* Johnson, 8 *Exch.*, 689. But see Hunter *v.* Le Conte, 6 *Cow.*, 728; Walter *v.* Dewey, 16 *Johns.*, 222.

Rents, when payable.

§ 802. The rent of agricultural and wild land is payable yearly at the end of each year, and other rents quarterly at the end of each quarter from the time the hiring takes effect, except in the cities of New York and Brooklyn, where rents are payable quarterly on the first days of August, November, February and May.[1]

[1] 1 R. S., 744, § 1, extended to Brooklyn.

Lease of agricultural land limited to 12 years.

§ 803. No lease of agricultural land, reserving rent or service of any kind, can be made for a longer period than twelve years.

Const. of N. Y., art. 1, § 14.

Renewal of lease by les-

§ 804. If a lessee remains in possession of the premises after the expiration of the hiring, and the lessor accepts

rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time,[1] not exceeding one year, or in the cities of New York and Brooklyn, not longer than until the next first day of May.

see's continued possession.

Bishop *v.* Howard, 2 *B. & C.*, 100; see Doe *v.* Amey, 12 *Ad. & El.*, 476.

## CHAPTER III.

### HIRING OF PERSONAL PROPERTY.

SECTION 805. Obligations of letter of personal property.
806. Obligations and rights of hirer.
807. Return of thing hired.

§ 805. Whoever lets personal property must deliver the thing hired to the hirer, secure his quiet enjoyment thereof against all lawful claimants, put it into a condition fit for the purpose for which he lets it, and repair all deteriorations thereof not occasioned by the fault of the hirer, and not the natural result of its use.

Obligations of letter of personal property.

Story Bailm., § 383.

§ 806. The hirer must bear all the expenses of the thing hired during the hiring, except that for such as are necessarily incurred by him for the prevention or repair of injuries thereto, not happening through his fault, and for these he is entitled to compensation from the person letting,[1] who may however exonerate himself by surrendering the thing to the hirer.

Obligations and rights of hirer.

[1] Story on Bailm., §§ 388, 389; 1 Pars. Cont., 607; Harrington *v.* Snyder, 3 *Barb.*, 380.

§ 807. At the expiration of the term for which the thing is hired, the hirer must return it to the person letting at the place contemplated by the parties at the time of hiring, or if no particular place was so contemplated by them, at the place at which it was at that time.

Return of thing hired.

# TITLE VII.

## EMPLOYMENT AND SERVICE.

CHAPTER I. Employment in general.
II. Particular employments.
III. Service without employment.

## CHAPTER I.

### EMPLOYMENT IN GENERAL.

ARTICLE I. Employment, what.
II. Obligations of the employer.
III. Obligations of the employee.
IV. Termination of employment.

## ARTICLE I.

### EMPLOYMENT, WHAT.

SECTION 808. Employment, what.
809. Contracts for service limited to two years.

Employment, what.

§ 808. The contract of employment is a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or of a third person.

Contracts for service limited to two years.

§ 809. A contract to serve for more than two years, or for an indefinite period, cannot be enforced against the employee beyond the term of two years from the commencement of service under it, but if the employee voluntarily continues his service under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation.

This section is new.

## ARTICLE II.

### OBLIGATIONS OF THE EMPLOYER

SECTION 810. Employer must indemnify employee.
811. Exceptions.
812. Employer to indemnify for his own negligence.
813. Definitions of care, &c.

Employer must indemnify employee.

§ 810. The employer must indemnify the employee, except as prescribed by the next section, for all that he necessarily expends or loses in direct consequence of the discharge of his duties as such,[1] or of his obedience to the directions of the employer,[2] even though unlawful,[3] if the employee had not, at the time of obeying such directions, the means of knowing them to be unlawful.

[1] Story Agency, § 335 to § 340; Code of La., 2991, 2993; Castle *v.* Noyes, 14 *N. Y.*, 332; Ramsay *v.* Gardner, 11 *Johns.*, 439; Adamson *v.* Jarvis, 4 *Bing.*, 66; Betts *v.* Gibbins, 2 *Ad. & El.*, 57; Taylor *v.* Stray, 2 *C. B.* (*N. S.*), 196.

[2] Roberts *v.* Smith, 2 *H. & N.*, 213.

[3] Adamson *v.* Jarvis, 4 *Bing*, 66; see Humphrys *v.* Pratt, 5 *Bligh* (*N. S.*), 154; as explained in Collins *v.* Evans, 5 *Q. B.*, 829, 830.

Exceptions.

§ 811. He is not bound to indemnify an employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business,[1] unless he has neglected to use ordinary care in the selection of the culpable employee.[2]

[1] Sherman *v.* Rochester and Syracuse R. R., 17 *N. Y.*, 156; Russell *v.* Hudson River R. R., *id.*, 136; Coon *v.* Syracuse and Utica R. R., 5 *N. Y.*, 492; Boldt *v.* New York Central R. R. 18 *N. Y.*, 432.

[2] See same cases, and Ormond *v.* Holland, *Ell. B. & E.*, 105.

Employer to indemnify for his own negligence.

§ 812. He must in all cases indemnify the employee for losses caused by his own ordinary negligence.

Roberts *v.* Smith, 2 *H. & N.*, 213; Keegan *v.* Western R. R., 8 *N. Y.*, 175, 180.

Definitions of care, &c.

§ 813. Care, diligence, and negligence, as mentioned in this title, are defined in the title on DEFINITIONS.

## ARTICLE III.

### OBLIGATIONS OF THE EMPLOYER.

SECTION 814, 815, 816. Duties of gratuitous employee.
817. Duties of employee for reward.
818. Duties of employee for his own benefit.
819. Obedience of employee.
820. Employee to conform to usage.
821. Degree of skill required.
822. Duty to account.
823, 824. Duty to pay over.
825. Preference to be given to employers.
826. Delegation of employment.
827. Responsibility for negligence.
828. Surviving employee.
829. Confidential employment.

**Duties of gratuitous employee.**

§ 814. One who without consideration, undertakes to do a service for another, is not bound to perform the same, but if he actually enters upon its performance, he must use at least slight care and diligence therein.

Edson *v.* Weston, 7 *Cow.*, 278; Coggs *v.* Bernard, 2 *Ld. Raym.*, 909.

§ 815. One who induces another to intrust him with the performance of a service, must perform the same fully. In other cases one who undertakes a gratuitous service may relinquish it at any time.

See Story Bailm., § 166.

§ 816. One who accepts a written power of attorney must act under it so long as he retains it.

Code La., 2971.

**Duties of employee for reward.**

§ 817. One who, for a good consideration, agrees to serve another, must perform the service, and must use ordinary care and diligence therein, so long as he is thus employed.

Story on Bailm., §§ 398, 399, 429, 442.

**Duties of employee for his own benefit.**

§ 818. One who is employed at his own request to do that which is more for his own advantage than for that of his employer, must use great care and diligence therein.

Obedience of employee

§ 819. The employee must obey all the lawful directions of his employer concerning the service on which he is engaged,[1] except in case of an emergency which, so far as he has the means of knowing, his employer did not contemplate, in which he cannot be consulted, and in which disobedience is absolutely necessary for the protection of his interests.[2]

[1] Wilson *v.* Wilson, 26 *Penn.*, 394.
[2] Story on Agency, §§ 85, 141, 193.

Employee to conform to usage.

§ 820. The employee must perform his service in conformity to the usage of the place of performance, unless otherwise directed by his employer, or unless it is impracticable, or manifestly injurious to his employer to do so.

Story on Agency, § 199. See Horton *v.* Morgan, 19 *N. Y.*, 170.

Degree of skill required.

§ 821. He is bound to exercise a reasonable degree of skill,[1] unless the person for whom he does the service has notice of his want of skill.[2] He is always bound to use such skill as he possesses.[3]

[1] Harmer *v.* Cornelius, 5 *C. B.* (*N. S.*), 236; Story Bailm., §§ 431–435.
[2] Shiells *v.* Blackburne, 1 *H. Blacks.*, 158.
[3] Wilson *v.* Brett, 11 *M. & W.*, 113.

Duty to account.

§ 822. He must, on demand, render to his employer just accounts of all his transactions in the course of his service, as often as may be reasonable.[1]

[1] Story Ag., § 203.

Duty to pay over.

§ 823. He must render to his employer, upon demand, everything which he acquires on account of his employer, even though he should acquire it unlawfully.[1] He must render the same without demand, if so required by his instructions, or by usage.[2]

[1] Code La., 2974.
[2] Stacy *v.* Graham, 14 *N. Y.*, 497.

§ 824. The obligation imposed by the last section remains in force after the termination of the employment.[1]

[1] Edmonston *v.* Hartshorne, 19 *N. Y.*, 9.

Preference to be given to employers.

§ 825. An employee who has any business to transact on his own account, similar to that entrusted to him by

his employer, must always give the latter the preference. If entrusted with similar affairs by different employers, he must give them preference according to the order in which they were committed to him.

Delegation of employment.

§ 826. An employee who is expressly authorized to employ a substitute, is liable to his principal only for want of ordinary care in his selection. The substitute is directly responsible to the principal.

Story on Agency, § 217 *a*. But query?

Responsibility for negligence.

§ 827. An employee who is guilty of a culpable degree of negligence, is liable to his employer for the damage caused thereby to the latter, and the employer is liable to him, if the service is not gratuitous, for the value of such services only as are properly rendered.

Surviving employer.

§ 828. Where the service is to be rendered by two or more jointly and one of them dies, the survivor must act alone, if the service to be rendered be such as he can as well perform without the aid of the deceased person, but not otherwise.

See Story on Bailm., § 202.

Confidential employment.

§ 829. The obligations peculiar to confidential employments are defined in the chapter on TRUSTS.

## ARTICLE IV.

### TERMINATION OF EMPLOYMENT.

SECTION 830, 831, 832. Employment, how terminated.
833. Continuance of service in certain cases.

Employment, how terminated.

§ 830. An employment having no specified term may be terminated at the will of either party on notice to the other.

Story Ag., §§ 462, 476, 477.

Id.

§ 831. Every employment is terminated,

1. By the expiration of its appointed term;
2. By the extinction of its subject;
3. By the death of the employee;
4. By his legal incapacity to act as such.

§ 832. Every employment, in which the power of the employee is not coupled with an interest in its subject, is terminated by notice to him[1] of

Employment, how terminated.

1. The death of the employer, or
2. His legal incapacity to contract.

[1] This section alters the common law by continuing the power until the agent has notice of the principal's change of condition. Such a doctrine is maintained by Story (Agency, § 495), and is obviously just.

§ 833. The employee must however continue his service after notice of the death or incapacity of his employer, so far as is necessary to protect, from serious injury, the interests of the employer's successor in interest.

Continuance of service in certain cases.

## CHAPTER II.

### PARTICULAR EMPLOYMENTS.

ARTICLE I. Master and Servant.
II. Agents.
III. Factors.
IV. Shipmasters.
V. Mates and Seamen.

## ARTICLE I.

### MASTER AND SERVANT.

SECTION 834. Servant, what.
835. Time of service.
836. Servant may forcibly defend master.
837, 838. When may be discharged.
839. Apprentices.

§ 834. A servant is one who is employed to render personal service to his employer, and who in such service remains entirely under the control and direction of the latter, who is called his master.

Servant, what.

§ 835. In the absence of any agreement upon the subject, the entire time of a domestic servant belongs to the master; and the time of other servants to such extent as is usual in the business in which they serve, not exceeding in any case ten hours in any one day.

Time of service.

Servant may forcibly defend master.

§ 836. A servant may use force for the protection of his master from injury to the same extent as the master himself may use it.

Leeward *v.* Basilee, 1 *Salk.*, 407.

When may be discharged.

§ 837. The master may discharge a servant employed about his person, or in a confidential position, whether engaged for a fixed term or not, upon discovering that he has been guilty of misconduct, before or after the commencement of his service, of such a nature that if the master had known or contemplated it, he would not have so employed him.

Ibid.

§ 838. The master may discharge any servant, whether engaged for a fixed term or not; who is guilty of misconduct in the course of his service,[1] or of gross immorality unconnected with the same.[2]

[1] Turner *v.* Mason, 14 *M. & W.*, 112; Singer *v.* McCormick, 4 *Watts & S.*, 265; Amor *v.* Fearon, 9 *Ad. & El.*, 548; Callo *v.* Brouncker, 4 *Carr. & P.*, 518.

[2] Atkin *v.* Acton, 4 *Carr. & P.*, 208; Libhart *v.* Wood, 1 *Watts & S.*, 265.

Apprentices.

§ 839. The last two sections do not apply to apprentices bound under indenture pursuant to the provisions of this Code.

## ARTICLE II.

### AGENTS.

SECTION 840. Agent to conform to his authority.
841. Must keep his principal informed.

Agent to conform his authority.

§ 840. An agent must not exceed the limits of his actual authority, as defined by the title on AGENCY.

Must keep his principal informed.

§ 841. He must use ordinary diligence to keep his principal informed of his acts in the course of the agency.

Story Agency, § 207.

## ARTICLE III.

### FACTORS.

SECTION 842. General rules.
843. Sales on credit.

General rules.

§ 842. A factor is subject to the rules which govern agents and employers in general. But if, after he makes advances to his principal upon the property consigned to him, the latter restricts his authority to sell, he may require his principal to repay him his advances, and in default thereof, may sell for the best price obtainable, notwithstanding the restrictions imposed by his principal.

[1] Marfield *v.* Goodhue, 3 *N. Y.*, 62.

Sales on credit.

§ 843. He may sell the property consigned on such credit as is usual, unless forbidden to do so by his principal.

1 Story Cont., § 150.

## ARTICLE IV.

### SHIPMASTERS.

SECTION 844. Appointment of master.
845. When must be on board.
846. Pilotage.
847. Power of the master.
848. Impressing private stores.
849. Abandoning the ship.
850. When master cannot trade on his own account.
851. Care and diligence.
852. Master as agent.

Appointment of master.

§ 844. The master of a ship is appointed by the owner and holds during his pleasure.

3 Kent Com., 161. The French Code de Commerce, Art. 219, provides that if a master who is dismissed is one of the owners of the ship, he may renounce his interest to the others and require from them the payment of the value thereof.

When must be on board.

§ 845. The master is bound to be always on board when entering or leaving a port, harbor or river.

Code de Com., Art. 227.

Pilotage.

§ 846. In leaving or entering a port, the master must take a pilot if one offers himself, and while the pilot is on board, the navigation of the ship devolves on him.

Regulations respecting pilots of this state are contained in the POLITICAL CODE.

Power of the master.

§ 847. The master may enforce the obedience of the mate and seamen to his commands by confinement and other corporal punishment, being responsible for the abuse of his power. He may also confine any other of the ship's company, or a passenger, for wilful disobedience to his commands.

Impressing private stores.

§ 848. If, during the voyage, the ship's supplies fail, the master, with the advice of the officers, may compel persons who have private supplies on board to surrender them for the common want, on payment of their value or security therefor.

Code de Com., Art. 249.

Abandoning the ship.

§ 849. The master cannot abandon the ship during the voyage without the advice of the other officers. In the event of abandonment he must, so far as it is in his power, carry with him the money and the most valuable of the goods, under penalty of being personally responsible. If the articles thus taken are lost from a casualty, he is exonerated from liability.

Code de Com., Art. 241.

When master cannot trade on his own account.

§ 850. A master who engages for a common profit on the cargo cannot trade on his own account, unless it is agreed that he may. In case of a violation of this section, he must account to his employers for all profits thus made by him.

Code de Com., Art. 239, 240, modified to conform to the law of partnership.

Care and diligence.

§ 851. He must use great care and diligence in the performance of his duties, and is responsible for all damage occasioned by his negligence, however slight.

Code de Com., Art. 221.

Master or agent.

§ 852. The authority and liability of the master as an agent for the owner, are regulated by the chapter on AGENCY.

## ARTICLE V.

### MATE AND SEAMEN.

SECTION 853. The Mate.
854. Seamen defined.
855. Mate and seamen how engaged and discharged.
856. Law regulating seamen.
857. Seamen cannot sh p goods.
858. Embezzlement and injuries.
859. Wages depend on freight.
860. When wages, &c., begin.
861. Wages where voyage is broken up before departure.
862. Wrongful discharge.
863. Seamen not to lose wages or lien by agreement.
864. Wages not lost by wreck.
865. Disabled seamen.
866. Maintenance of seamen during sickness.
867. Death on the voyage.
868. Theft, &c., forfeits wages.

**The mate.**

§ 853. The mate of a ship is the officer next in rank to the master, and in case of the master's disability he must take his place. By so doing, he does not lose any of his rights as mate.

2 *Metc.*, 445.

**Seamen defined.**

§ 854. All persons employed in the navigation of the ship or upon the voyage other than the master and mate, are to be deemed seamen within the provisions of this Code.

**Mate and seamen, how engaged and discharged.**

§ 855. The mate and seamen are engaged by the master, and may be discharged by him at any period of the voyage for wilful and persistent disobedience or gross disqualification.

For this and the following provisions of this article, see 3 Kent Com., 176, except where otherwise indicated.

**Law regulating seamen.**

§ 856. The shipment of officers and seamen and their rights and duties are further regulated by acts of Congress.

**Seamen cannot ship goods.**

§ 857. Seamen cannot, under any pretext, ship goods on their own account without permission from the master.

Code de Com., art. 251.

Embezzlement and injuries.

§ 858. If any part of the cargo or appurtenances of the ship is embezzled or injured by the mate or seamen, the offender, or if it is not known which is the offender, all those of whom negligence or fault may be presumed, must make good the loss.

Lewis *v.* Davis, 3 *Johns.*, 17; Spurr *v.* Pearson, 1 *Mass.*, 104.

Wages depend on freight.

§ 859. Except as hereinafter provided, the wages of seamen are due when, and so far only, as freight money is earned, unless the loss of freight money is owing to the fault of the owner or master.

When wages, &c. begin.

§ 860. The right of a seaman to wages and provisions begins either from the time he begins work, or from the time specified in the agreement for his beginning work, or from his presence on board, whichever first happens.

13 and 14 *Vict.*, *c.* 93, § 56.

Wages where voyage is broken up before departure.

§ 861. Where a voyage is broken up before departure of the ship, the seamen must be paid for the time they have served, and may retain for their indemnity such advances as they have received.

Modified from Code de Com., art. 252.

Wrongful discharge.

§ 862. When a seaman is wrongfully discharged, or is driven to leave the ship by the cruelty of the master on the voyage, it is then ended with respect to him, and he may then recover his full wages.

2 Pars. Mar. Law, 574.

Seamen not to lose wages or lien by agreement.

§ 863. No seaman by reason of any agreement can forfeit his lien upon the ship, or be deprived of any remedy for the recovery of his wages to which he would otherwise have been entitled. Any stipulation by which he consents to abandon his right to wages in case of the loss of the ship, or to abandon any right he may have or obtain in the nature of salvage, is void.

From 13 and 14 *Vict.*, *c.* 93, § 53.

Wages not lost by wreck.

§ 864. In case of wreck or loss of the ship, a seaman is entitled to his wages up to the time of the wreck or loss, whether freight has been earned or not, if he exerted himself to the utmost to save the ship, cargo and stores.[1] A

certificate of the fact from the master or chief surviving officer of the vessel is presumptive evidence of such exertion.

[1] This provision is substantially enacted in England (Stat, 7 and 8 Vict., c. 112, § 17,) making the seaman's right, however, absolutely dependent upon the officer's certificate.

Disabled seamen.

§ 865. Where a seaman is prevented from rendering service by illness or injury, incurred without his fault,[1] in the discharge of his duty on the voyage, or by being wrongfully discharged, or by a capture of the ship, he is entitled to wages notwithstanding; but in case of capture, a ratable deduction for salvage is to be made.

6 Law Reporter, 311.

Maintenance of seamen during sickness.

§ 866. If a seaman becomes sick or disabled during the voyage without his fault, the expense of furnishing him with suitable medical advice, medicine, attendance, and other provision for his wants, must be borne by the ship till the close of the voyage.

1 Pars. Mar. Law, 456.

Death on the voyage.

§ 867. If a seaman dies during the voyage, his personal representatives are entitled to his wages to the time of his death, if he would have been entitled to them had he lived to the end of the voyage.

Theft, &c., forfeits wages.

§ 868. Deserting the ship without just cause, or a justifiable discharge by the master during the voyage, for misconduct, or a theft of any part of the cargo or appurtenances of the ship, or a wilful injury thereto or to the ship, forfeits all wages due the seaman for the voyage.

## CHAPTER III.

### SERVICE WITHOUT EMPLOYMENT.

SECTION 869. Voluntary interference with property.
870. Salvage.

Voluntary interference with property.

§ 869. One who officiously, and without the consent of the real or apparent owner of a thing, takes it into his possession, for the purpose of rendering a service about it, must complete such service, and use ordinary care, diligence and reasonable skill about the same. He is not entitled to any compensation for his service or expenses, but may deduct actual and necessary expenses incurred by him about such service from any profits which his service has caused the thing to acquire for its owner, and must account to the owner for the residue.

Salvage.

§ 870. Any person, other than the master or seaman who rescues a ship, her appurtenances, or cargo, from danger, is entitled to a reasonable compensation therefor, to be paid out of the property saved. He has a lien for such claim, which is regulated by the title on LIENS.

Baker *v.* Hoag, 7 *N. Y.*, 557.

# TITLE VIII.

## CARRIAGE.

CHAPTER I. Carriage in general.
II. Carriage of persons.
III. Carriage of property.
IV. Carriage of messages.
V. Common Carriers.

## CHAPTER I.

### CARRIAGE IN GENERAL.

SECTION 871. Contract of carriage.
872. Different kinds of carriers.
873. Care and diligence required of carriers.
874. Carriers by railroad and steamboat.
875. Carriers by sea.

Contract of carriage.

§ 871. The contract of carriage is a contract for the conveyance of property, persons, or messages, from one place to another.

Different kinds of carriers.

§ 872. Carriers are:

1. Inland;

2. Marine.

Marine and inland carriers defined.

§ 873. Carriers upon the ocean, upon arms of the sea, upon the great lakes Ontario, Erie, Huron, Michigan and Superior, and upon the rivers and canals connecting those lakes with each other, are carriers by sea. All others are inland carriers.

Care and diligence required of carriers.

§ 874. A carrier for reward must use at least ordinary care and diligence in the performance of all his duties. A carrier without reward must use at least slight care and diligence.

Carriers by railroad and steamboat.

§ 875. Rights and duties peculiar to carriers by railway and steamers, are defined in the POLITICAL CODE.

Carriers by sea.

§ 876. Rights and duties peculiar to carriers by sea, are defined by statutes of the United States.

## CHAPTER II.

### CARRIAGE OF PERSONS.

SECTION 877. Care and skill required of carriers of persons.
878. Not to overload his vehicle.
879. Civility toward passengers.
880. Passengers to have usual and reasonable accommodations.
881. Rate of speed and delays.
882. Time occupied by journey.

Care and skill required of carriers of persons.

§ 877. The carrier of persons must use the utmost care for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill.[1]

[1] Ang. on Carr., §§ 521–523, 534–539.

Not to overload his vehicles.

§ 878. He must not overcrowd nor overload his vehicle.[1]

Angell on Carr., § 528; Derwort *v.* Loomer, 21 *Conn.*, 245.

Civility towards passengers

§ 879. He must treat passengers with civility,[1] and give them a reasonable degree of attention.[2]

[1] Story on Cont., § 796 *b.*
[2] See Hall *v.* Conn. Steamb. Co., 13 *Conn.*, 319.

Passengers to have usual and reasonable accommodations.

§ 880. He must give to passengers all such accommodations as are usual and reasonable.[1]

[1] Story on Bailm., § 597; Ang. on Carr., § 533.

Rate of speed and delays.

§ 881. He must travel at a reasonable rate of speed, and without any unreasonable delays.

Time occupied by journey.

§ 882. He must complete the journey within such time as he engaged to do so, or within a reasonable time, when he has specified none.

# CHAPTER III.

## CARRIAGE OF PROPERTY.

ARTICLE I. General definitions.
II. Obligations of the carrier.
III. Bill of Lading.
IV. Freight money.
V. General average.

## ARTICLE I.

### GENERAL DEFINITIONS.

SECTION 883. Freight, consignor and consignee defined.

§ 883. The property carried is called freight, the person who delivers it to the carrier is called the consignor, and the person to whom it is to be delivered is called the consignee.

Freight, consignor and consignee defined.

## ARTICLE II.

### OBLIGATIONS OF THE CARRIER.

SECTION 884. Must obey consignor's instructions.
885. Freight on ship's deck.
886. Delivery of freight.
887. Place of delivery.
888. Obligations of carrier when freight is not delivered to consignee. Liability as warehouseman.
889. When consignee cannot be found.

§ 884. The carrier must obey all reasonable instructions of the consignor concerning the freight.

Story on Bailm., § 509.

Must obey consignor's instructions.

§ 885. Freight must not be stowed upon the deck of a vessel during a sea voyage, except by permission of the consignor.

Code de Commerce, art. 229.

Freight on ship's deck.

§ 886. The carrier must deliver freight to the consignee, his agents, or assigns, at the place to which it is addressed, in the manner customary at that place.

Delivery of freight.

Place of delivery.

§ 887. If there is no custom to the contrary at the plac of delivery, the delivery must be made as follows:

1. If the carrier carries freight upon a railway owne or managed by him, he must deliver it at the station near est the place to which it is addressed;

2. If he carries freight upon seas, lakes, and navigabl streams only, he must deliver it at the wharf where hi vessel moors, within a reasonable distance from the plac of address, or if there is no wharf, on board a lighte alongside the vessel;

3. In other cases, he must deliver the freight to the con signee or his agent, personally.

Obligations of carrier when freight is not delivered to consignee. Liability as warehouseman.

§ 888. If for any reason the carrier does not deliver th freight to the consignee or his agent personally, he mus give notice to such consignee of its arrival, and keep th same in safety upon his responsibility as a carrier, until th consignee has had a reasonable time to remove it.[1] If it i not removed in a reasonable time, the carrier is thereafte liable as a warehouseman only, and may charge storage or may place it in a warehouse for the account and risk o the consignee, giving him immediate notice thereof.

[1] Price *v.* Powell, 3 *N. Y.*, 322.

When consignee cannot be found.

§ 889. If the consignee cannot, with reasonable dili gence, be found, the carrier may place the freight in ware house for his account, but must give notice thereof to the consignor.

Fisk *v.* Newton, 1 *Denio*, 45.

## ARTICLE III.

### BILL OF LADING.

SECTION 890. Bill of lading, what.
891. Bill of lading negotiable.
892. Effect thereof on rights, &c., of carrier.
893. To be given to consigor.
894. Carrier may demand production thereof

Bill of lading, what.

§ 890. A bill of lading is an instrument in writing, signed by the carrier or his agent, describing the freight so as to identify it, stating the name of the consignor, the

terms of the contract for carriage, and agreeing or directing that the freight be delivered to the order or assigns of a specified person at a specified place.

Bill of lading negotiable.

§ 891. A bill of lading is negotiable by indorsement in like manner and with like effect as negotiable paper.[1]

[1] New, but in accordance with the universal intention and wish of merchants. Compare Dows *v.* Rush, 28 *Barb.*, 185, with Dows *v.* Perrin, 16 *N. Y.*, 332.

Effect of bill of lading on rights, &c., of carrier.

§ 892. A bill of lading does not alter the rights or obligations of the carrier as defined in this chapter, unless it is plainly inconsistent therewith.

Bill of lading to be given to consignor.

§ 893. The carrier on demand of the consignor, must subscribe and deliver to him any reasonable number of bills of lading of the same terms expressing truly the original contract for carriage. If the carrier refuses so to do, the consignor may take the freight from him, and recover from him besides all damage thereby occasioned.

Carrier may demand production of bill of lading before delivery.

§ 894. When the carrier has given a bill of lading or other negotiable instrument substantially equivalent thereto, he has a right to demand the production of the same, or a reasonable indemnity against claims thereon, before delivering the freight.

## ARTICLE IV.

### FREIGHT MONEY.[1]

SECTION 895. What it is.
896. When to be paid.
897. Who is liable for freight money.
898. Natural increase of freight.
899. Apportionment by contract.
900. Apportionment by distance.
901. Freight carried further than agreed, &c.
902. Carrier's lien.

Freight money defined.

§ 895. The hire or compensation of a carrier is called freight money.

When freight mo-

§ 896. The carrier may require his freight money to be paid upon his receiving the freight; but if he does not

[1] "Freight" properly signifies the thing carried. By a figure of speech, it is also used to denote the carrier's reward. This however should be called freight money.

ney is to be paid.

demand it then, he cannot until he is ready to deliver the freight to the consignee.

Who is liable for freight money.

§ 897. The consignor is presumed to be liable for the freight money, but if the contract between him and the carrier provides that the consignee shall pay the freight money, and if the carrier allows the consignee to take the freight, he cannot afterwards recover it from the consignor. The consignee is liable for the freight money if he accepts the freight after notice of the intention of the consignor that he should pay it.

Natural increase of freight.

898. No freight money can be charged on the natural increase of the freight.

1 Pars. Marit. Law, 149, 150.

Apportionment of freight money.

§ 899. If the freight money is apportioned by the bill of lading or other contract made between the consignor and carrier, the carrier is entitled to payment, according to the apportionment, for so much as he has delivered. If a part of the freight is accepted by the consignee without a specific objection that the rest is not delivered, the freight money must be apportioned and paid as to that part, though not apportioned in the original contract.

1 Pars. Marit. Law, 149.

Apportionment according to distance freight is carried.

§ 900. If the consignee voluntarily receives the freight at a place short of the one appointed for delivery, the carrier is entitled to a just proportion of the freight money according to distance.[1] If the carrier is ready and willing to complete the journey, he is entitled to the full freight money.[2] If he is not so ready or willing, and the consignee receives the freight only from necessity, the carrier is not entitled to any freight money.[3]

[1] Ang. on Carr., § 404.
[2] Violett *v.* Stettinius, 5 *Cranch C. C.*, 559.
[3] Ang. on Carr., § 407.

Freight carried further than agreed, &c.

§ 901. If the freight is carried further, or more expeditiously, than was agreed upon by the parties, the carrier is not entitled to any additional compensation, nor may he refuse to deliver it on the demand of the consignee at the place and time of its arrival.

§ 902. The carrier has a lien for freight money, which is regulated by the title on LIENS.

Carrier's lien for freight money.

## ARTICLE V.

### GENERAL AVERAGE.

SECTION 903. Jettison, what.
904. By whom made.
905. Loss, how borne.
906. General average loss, what.
907. Value, how ascertained.
908. Things stowed on deck.

§ 903. A carrier by water may, in case of extreme peril, when it is necessary for the safety of the ship or cargo, throw overboard, or otherwise sacrifice, any part or all of the cargo or appurtenances of the ship,[1] beginning with the most bulky and least valuable articles,[2] so far as possible. Throwing property overboard for such purpose is called jettison.

When carrier may throw cargo overboard. Jettison.

[1] Lawrence *v.* Minturn, 17 *How. U. S.*, 100; 3 Kent Com., 233.
[2] Code de Commerce, art. 411.

§ 904. Jettison, or other voluntary sacrifice of any part of the cargo or appurtenances, can be made only by authority of the master, except that in case of his disability, or under an overruling necessity, it may be made by any other person.[1]

Jettison made by authority of ship-master, &c.

[1] 3 Kent Com., 233.

§ 905. The loss incurred by such a sacrifice of property, when lawfully made, must be borne in due proportion by all that part of the ship, appurtenances, freight money, and cargo which is saved by such sacrifice,[1] as well as by the owner of the thing sacrificed.[2]

Loss incurred by jettison, &c., how borne.

[1] Barnard *v.* Adams, 10 *How. U. S.*, 270, 303.
[2] Lee *v.* Grinnell, 5 *Duer*, 431; Simonds *v.* White, 2 *B. & C.*, 805.

§ 906. Such a loss is called a general average loss, the proportion falling to each part of the property liable to bear it being ascertained by a general average, in which the owner of each separate interest therein, is to be charged

General average loss defined.

with such proportion of the value of the thing lost, as the value of his part of the property affected bears to the value of the whole.[1]

[1] 3 Kent Com., 232.

Values of ship, &c., in case of general average how ascertained.

§ 907. In estimating values for this purpose, the ship and appurtenances must be valued as at the time of the loss, the freight money as at the end of the voyage, and the cargo as at the time and place of its discharge.[1]

[1] 3 Kent Com., 242.

Owner of things stowed on deck, when entitled, &c.

§ 908. The owner of things stowed on deck, in case of their jettison, is entitled to the benefit of a general average contribution only in case it is customary to stow the same on deck upon such a voyage.[1]

[1] Lawrence *v.* Minturn, 17 *How. U. S.*, 100; Sayward *v.* Stevens, 3 *Gray*, 97; Smith *v.* Wright, 1 *Caines*, 43; Lenox *v.* United Ins. Co., 3 *Johns. Cas.*, 178; limited by Gould *v.* Oliver, 4 *Bing. N. C.*, 134; S. C. again, 2 *M. & G.*, 208; Milward *v.* Hibbert, 3 *Q. B.*, 120.

## CHAPTER IV.

### CARRIAGE OF MESSAGES.

SECTION 909. Obligations of such carrier.
910. Degree of care and diligence required.

Obligations of carrier of messages

§ 909. A carrier of messages must deliver them at the place to which they are addressed, or to the persons for whom they are intended.

Degree of care and diligence required

§ 910. He must use great care and diligence in the transmission and delivery of messages. A carrier by telegraph must use the utmost diligence therein.

# CHAPTER V.

## COMMON CARRIERS.

ARTICLE I. Common carriers in general.
II. Common carriers of persons.
III. Common carriers of property.
IV. Common carriers of messages.

## ARTICLE I.

### COMMON CARRIERS IN GENERAL.

SECTION 911. Common carrier, what.
912. Obligation to accept freight.
913. Not to give preference.
914. Starting.
915. Compensation.
916. Obligations, how altered.
917. Effect of written contract.

Common carrier, what.

§ 911. Every one who offers to the public at large to carry persons, property or messages, is a common carrier of whatever he thus offers to carry.

Obligation to accept freight.

§ 912. He must, if able to do so, accept and carry whatever is offered to him, of a kind that he undertakes or is accustomed to carry, if offered at a reasonable time.[1]

[1] Story's Bailm., § 508; Bennett *v.* Dutton, 10 *N. H.*, 481.

Obligation. not to give preference.

§ 913. A common carrier must not give preference, in time, price, or otherwise, to one person over another,[1] except where expressly prescribed by statute. He must always give a preference in time, and may give a preference in price, to the United States and to this State.

[1] Story's Bailm., § 508.

Starting.

§ 914. His vehicle must start at such time and place as he announces to the public.[1]

[1] Angell on Carr., § 527, *a*.

Compensation.

§ 915. He is entitled to a reasonable compensation, which he may require to be paid in advance. If payment thereof is refused, he may refuse to carry. But he cannot

require more than a reasonable compensation for his services.

Obligations of carrier, how altered

§ 916. The rights and obligations of a common carrier cannot be altered by notice on his part,[1] or in any other manner except by special agreement with the parties with whom he deals.[2] Nor can he by any agreement made in anticipation thereof, be exonerated from liability for gross negligence, fraud, or wilful wrong.[3]

[1] Cole *v.* Goodwin, 19 *Wend.*, 251; approved, 11 *N. Y.*, 485.

[2] Dorr *v.* N. J. Steam Nav. Co., 11 *N. Y.*, 485.

[3] Penn. R. R. *v.* McCloskey, 23 *Penn.*, 532; Camden & Amboy R. R. *v.* Baldauff, 16 *Penn.*, 67.

Effect of written contract.

§ 917. The consignor or consignee by accepting a bill of lading or other written contract for carriage, with a knowledge of its terms, assents to the rate of hire, the time, place and manner of delivery therein stated. But his assent to any other modification of the carrier's rights or obligations contained in such instrument can only be manifested by his signature to the same.

## ARTICLE II.

### COMMON CARRIERS OF PERSONS.

SECTION 918. Obligation to carry luggage.
919. Liability for such luggage.
920. Luggage, what.
921. Number of vehicles required.
922. Seats for passengers.
923. Regulation.
924. Fare, when payable.
925. Ejection for non-payment, &c.
926. Carrier's lien.

To carry luggage of passengers.

§ 918. A common carrier of persons, unless his vehicle is fitted for the reception of passengers exclusively, must receive and carry a reasonable amount of luggage for each passenger, without any charge except for an excess of weight over one hundred pounds to a passenger.

§ 919. The liability of the carrier for luggage thus received, is the same as that of a common carrier of property.[1]

Liability in this respect.

[1] Story on Bailm., §§ 498, 499, 595; Ang. on Carr., § 571; Cole *v.* Goodwin, 19 *Wend.*, 251; Powell *v.* Myers, 26 *Wend.*, 591.

§ 920. Luggage may consist of any articles intended for the use of the passenger while traveling, or for his personal equipment.[1]

Luggage, what.

[1] Ang. on Carr., § 115; Story on Cont., § 768, *a. b.*; Redf. on Railw., § 144; Duffy *v.* Thompson, 4 *E. D. Smith*, 178; Davis *v.* Cayuga & Susq. R. R., 10 *How. Pr. R.*, 330; see Richards *v.* Westcott, 2 *Bosw.*, 589; Pardee *v.* Drew, 25 *Wend.*, 459.

§ 921. A common carrier of persons upon a route to which he has an exclusive right must provide a sufficient number of vehicles to accommodate all the passengers whom he has reason to expect will require carriage at any one time.

Obligation to provide sufficient number of vehicles.

§ 922. He must provide every passenger with a seat.

To provide seat for each passenger.

§ 923. A common carrier may establish regulations for the conduct of his business, and may require passengers to conform to them if they are public, uniform in their application, reasonable, and lawful.

Regulations for conduct of business.

§ 924. He may demand the fare of passengers, either at starting, or at any subsequent time.

Fare, when carrier may demand it.

§ 925. A passenger, who refuses to pay his fare, or to conform to any lawful regulation of the carrier, may be ejected from the vehicle by the carrier. But this must be done with as little violence as possible, and within a short distance from some dwelling-house. After that, the carrier has no right to require the payment of any part of the fare of such passenger.

Ejection for non-payment, &c.

§ 926. The carrier has a lien upon the luggage of the passenger for the payment of such fare as he is entitled to. This lien is regulated by the title on LIENS.

Carrier's lien upon passengers' luggage.

## ARTICLE III.

### COMMON CARRIERS OF PROPERTY.

SECTION 927. Liability of inland carriers for loss
928. Liability for delay.
929. Liability of marine carriers.
930. Perils of sea, what.
931. Consignor of valuables to declare their nature.
932. Delivery of freight beyond usual route.
933. Carrier's services other than carriage and delivery.

**Liability of inland carriers for loss.**

§ 927. Unless the consignor or his agent accompanies the freight and retains exclusive control thereof, an inland common carrier of property is liable,[1] from the time that he accepts until he delivers the same to the consignee,[2] for the loss or injury thereof from any cause whatever, except the following:

1. An inherent defect, vice or weakness, or a spontaneous action, of the property itself;[3]

2. The act of public enemies of the United States or of this State;[4]

3. Any irresistible superhuman cause.[5]

He is liable, even in these cases, if his ordinary negligence exposes the property to the cause of the loss.[6]

[1] Sto. Bailm., §§ 533, 578; Cohen *v.* Frost, 2 *Duer*, 355; Tower *v.* Utica R. R., 7 *Hill*, 47.
[2] Story on Bailm., §§ 533, 509.
[3] Id., § 492, *a*; Ang. on Carr., § 214 *a*; Clarke *v.* Rochester R. R., 14 *N. Y.*, 574.
[4] Sto. Bailm., §§ 510, 526.
[5] Id., § 511.
[6] Id., § 512 *a*.

**When liable for delay**

§ 928. He is liable for delay only when it is the effect of his own ordinary negligence.[1]

[1] Wibert *v.* N. Y. & Erie R. R., 11 *N. Y.*, 245.

**Liability of marine carriers.**

§ 929. A common carrier by sea is liable in like manner as an inland carrier, except for loss or injury caused by the perils of the sea or fire.

His liability is also regulated by statutes of the United States.[1]

[1] 9 U. S. Stat., 635.

§ 930. Perils of the sea are from

Perils of sea, what.

1. Storms, tempests and waves;
2. Rocks, shoals and rapids;
3. Other obstacles, though of human origin;
4. Changes of climate;
5. The confinement necessary at sea;
6. Marine animals;
7. All dangers peculiar to the sea.

Perils from animals not peculiar to the sea are not perils of the sea.[1]

[1] Aymar v. Astor, 6 *Cow.*, 267.

Consignor of valuables to declare their nature

§ 931. The consignor of gold, silver, platina, or precious stones, or imitations thereof, in a manufactured or unmanufactured state, of timepieces of any description, of negotiable paper or other valuable writings, of pictures, glass or china ware, must give notice to the carrier, by mark upon the package or otherwise, of the nature of the freight, or leave the contents plainly exposed to view, or the carrier will not be liable for more than fifty dollars upon the loss or injury of each package of such articles.[1]

[1] Modified from the English Carriers' Act of 1830. The U. S. Statute (March 3, 1851,) is not so broad as to articles specified.

Delivery of freight beyond the usual route.

§ 932. If the carrier accepts freight addressed to a place beyond his usual ronte, he must, unless he stipulates otherwise, deliver it at the end of his route in that direction to some other common carrier carrying to the place of address or connected with those who thus carry, and his liability ceases upon making such delivery.[1] But if such freight is lost or injured, the carrier must, within a reasonable time after demand, give satisfactory proof to the consignor that the loss or injury did not occur while it was in his charge,[2] or he will be himself liable therefor.

[1] Van Santvoord v. St. John, 6 *Hill*, 157. See Goold v. Chapin, 20 *N. Y.*, 259.

[2] This clause is intended to save the consignor from the risk of mistaken actions, by compelling the carrier to give such proof as would be required on a trial, the fair presumption being against him.

Carrier's services other than carriage and delivery.

§ 933. In respect to any service rendered by the carrier about the freight, other than its carriage and delivery, his rights and obligations are defined by the title on EMPLOYMENT.

## ARTICLE IV.

### COMMON CARRIERS OF MESSAGES.

SECTION 934. Order of transmission of telegraphic messages.
935. Order in other cases.
936. Damages when message is refused or postponed.

Order of transmission of telegraphic messages.

§ 934. A carrier of messages by telegraph must, if it is practicable, transmit every such message immediately upon its receipt. But if this is not practicable, and several messages accumulate upon his hands, he must transmit them in the following order:

1. Messages from public agents of the United States or this State, on public business;

2. Messages intended in good faith for immediate publication in newspapers, and not for any secret use;

3. Messages giving information relating to the sickness or death of any person;

4. Other messages in the order in which they were received.

Order of transmission in other cases.

§ 935. Other carriers must transmit messages in the order in which they receive them, except messages from agents of the United States or of this State, on public business, to which they must always give priority.

Damages when message is refused or postponed.

§ 936. Every person whose message is refused or postponed, contrary to the provisions of this chapter, is entitled to recover from the carrier his actual damages, and fifty dollars in addition thereto.

# TITLE IX.

## TRUSTS.

CHAPTER I. Trusts in general.
II. Trusts for the benefit of third persons.

## CHAPTER I.

### TRUSTS IN GENERAL.

ARTICLE I. Trust, what, and how created.
II. Obligations of trustees.
III. Obligations of third persons.

## ARTICLE I.

### TRUSTS, WHAT, AND HOW CREATED.

SECTION 937. Trusts, voluntary or involuntary.
938. Voluntary trust defined.
939. Involuntary trust defined.
940. Author of trust and trustee, who may be.
941. What constitutes one a trustee.
942. For what purpose a trust may be created.
943. Voluntary trusts how created, as to author of trust.
944. As to trustee.
945. Involuntary trustee, who is.
946. Involuntary trust resulting from negligence, &c.

§ 937. Trusts are:

1. Voluntary;
2. Involuntary.

Voluntary trust defined.

§ 938. A voluntary trust is an obligation arising from a personal confidence reposed by one, who is called the author of the trust,[1] in another who is called the trustee, for the benefit of a person who is called the beneficiary.

[1] The phrase "author of the trust" is cumbrous. Perhaps "trustor" would be a good substitute, but we have preferred not to insert a new term of this kind. Lewin, Hill, and other writers, call the creator of the trust the "settlor," a very objectionable word.

Involuntary trust defined.

§ 939. An involuntary trust is an obligation of the same nature imposed by law without regard to the consent of the trustee. An involuntary trustee, who becomes such through any fault of his own, has all the obligations without any of the rights of a voluntary trustee.

Trustor and trustee, who may be.

§ 940. The author of the trust may be its beneficiary, but the trustee cannot. One of several co-beneficiaries may however be trustee for the others.[1]

[1] See ex parte Clutton, 17 *Jur.*, 988.

What constitutes one a trustee.

§ 941. Every one who voluntarily assumes a relation of personal confidence with another is deemed a trustee within the meaning of this chapter,[1] not only as to the person who reposes such confidence, but also as to all persons of whose affairs he thus acquires information which was given to such person in the like confidence,[2] or over whose affairs he, by such confidence, obtains any control.[3]

[1] Gardner *v.* Ogden, 22 *N. Y.*, 343; Anderson *v.* Lemon, 8 *N. Y.*, 236; Moore *v.* Moore, 5 *N. Y.*, 256; Blisset *v.* Daniel, 10 *Hare*, 493, 536.

[2] Gardner *v.* Ogden, 22 *N. Y.*, 350.

[3] Bulkley *v.* Wilford, 2 *Clark & Fin.*, 102.

For what purpose a trust may be created.

§ 942. A trust may be created for any purpose for which a contract may lawfully be made, except as prescribed by the titles on USES AND TRUSTS and on TRANSFERS.

Voluntary trust how created, as to trustor.

§ 943. A voluntary trust is created, as to its author and beneficiary, by any words or acts of its author indicating with reasonable certainty:

1. An intention on the part of the author of the trust to create a trust;

2. The subject, purpose, and beneficiary of the trust.[1]

[1] Fisher *v.* Fields, 10 *John.*, 495; Briggs *v.* Penny, 3 *Macn. & G.*, 554; Reeves *v.* Baker, 18 *Beav.*, 372.

As to trustee.

§ 944. It is created, as to the trustee, by any words or acts of his, indicating with reasonable certainty:

1. His acceptance of the trust, or his acknowledgment, founded upon a valuable consideration, of its existence;

2. The subject, purpose, and beneficiary of the trust.

Day *v.* Roth, 19 *N. Y.*, 453.

§ 945. One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner.[1] Involuntary trustee, who is.

[1] Brown v. Lynch, 1 *Paige*, 147; see Anderson v. Lemon, 8 *N. Y.*, 236.

§ 946. One who, being employed by another, by his ignorance, negligence or fraud, gains an advantage at the expense of his employer, or of any person whom his employer intended to benefit, holds all that he thus gains as an involuntary trustee for the person who would otherwise have possessed it.[1] Involuntary trust resulting from negligence, &c.

[1] Bulkley v. Wilford, 2 *Clark & Fin.*, 102, 177, 181. The rule is stated in this case in much broader language, and ought, perhaps, to be expressed more strongly.

The following section may be taken as an alternative for the above:

§ 946. One who, by negligence, gains an advantage which, in the absence of such negligence, he could only have gained by fraud, is an involuntary trustee of the thing so gained, for the benefit of the person who would otherwise have had it.

## ARTICLE II.

### OBLIGATIONS OF TRUSTEES.

SECTION 947. Trustee's obligation to good faith.
948. Trustee not to use property for his own profit.
949. Liability to account for profits, &c.
950. Trustee's interest adverse to that of beneficiary.
951. Gifts from beneficiary to trustee.
952. Trustee not to assume a trust adverse to interest of beneficiary.
953. Trustee acquiring interest adverse to that of beneficiary.
954. Trustee guilty of a fraud, when.
955. Presumptions against trustees.
956. Trustee's responsibility for co-trustee.
957. Trustee mingling trust property with his own.

§ 947. In all matters connected with the trust, the trustee is bound to act in the highest good faith toward the beneficiary. He may not obtain any advantage over the latter in such matters by the slightest misrepresentation, concealment,[1] threat or adverse pressure of any kind. Trustee's obligation to good faith.

[1] Moore v. Moore, 5 *N. Y.*, 256; Gardner v. Ogden, 22 *N. Y.*, 327, as explained by Dobson v. Racey, 8 *N. Y.*, 218. See Abbott v. Amer. Hard Rubber Co., 33 *Barb.*, 593; N. Y. Central Ins. Co. v. Nat. Pro. Ins. Co., 14 *N. Y.*, 85.

Trustee not to use property for his own profit.

§ 948. The trustee may not use or deal with the trust property for his own profit, in any manner.[1]

[1] Holridge v. Gillespie, 2 *Johns. Ch.*, 33; Van Horne v. Fonda, 5 *id.*, 409; Green v. Winter, 1 *id.*, 36; see Anderson v. Lemon, 8 *N. Y.*, 236; Burhans v. Van Zandt, 7 *id.*, 257.

Liability to account for profits, &c.

§ 949. If he uses or disposes of the trust property for his own purposes, he must account for the profits so made,[1] or pay interest,[2] at the option of the beneficiary,[3] besides restoring the property originally taken by him.

[1] Docker v. Somes, 2 *Myl. & K.*, 665; Crawshay v. Collins, 15 *Ves.*, 218.

[2] Duffy v. Duncan, 32 *Barb.*, 593; Mumford v. Murray, 6 *Johns. Ch.*, 452.

[3] Heathcote v. Hulme, 1 *Jac. & W.*, 128.

Trustee's interest adverse to that of the beneficiary.

§ 950. He may not take part in any transaction concerning the trust, in which he, or any one for whom he acts as agent,[1] has an interest adverse to that of the beneficiary,[2] except as follows:

[1] Ex parte Bennett, 10 *Ves.*, 399, 400; N. Y. Central Ins. Co. v. National Pro. Ins. Co., 14, *N. Y.*, 85.

[2] Gardner v. Ogden, 22 *N. Y.*, 327; Moore v. Moore, 5 *N. Y.*, 256; Schenck v. Dart, 22 *N. Y.*, 423; Lewis v. Hillman, 3 *H. of L. Cas.*, 607, 629; Aberdeen R. R. Co. v. Blaikie, 1 *Macq.*, 461; Rothschild v. Brookman, 5 *Bligh* (*N. S.*), 190, 197, 202; Ex parte James, 8 *Ves.*, 337.

1. When the beneficiary, having capacity to contract,[3] with a full knowledge of the motives of the trustee,[4] and of all other facts concerning the transaction which might affect his own decision,[5] and without the use of any influence on the part of the trustee,[6] permits him to do so;[7]

[1] Campbell v. Walker, 5 *Ves.*, 678; 13 *id.*, 601.

[2] Coles v. Trecothick, 9 *Ves.*, 247.

[3] Coles v. Trecothick, 9 *Ves.*, 246; Randall v. Errington, 10 *Ves.*, 427; Morse v. Royal, 12 *Ves.*, 373.

[4] Gibson v. Jeyes, 6 *Ves.*, 276.

[6] Dobson v, Racey, 8 *N. Y.*, 218.

2. When, the beneficiary not having capacity to contract,[1] the supreme court,[2] upon the like information of the facts, grants the like permission;

[1] See Ex parte James, 8 *Ves.*, 352.

[2] Campbell v. Walker, 5 *Ves.*, 681, 682.

3. When some of the beneficiaries having capacity to contract, and some not having it, the former grant permission for themselves, and the supreme court for the latter, in the manner above prescribed.

Gifts from beneficiary to trustee.

§ 951. He may not use the influence which his position gives him to obtain gifts from the beneficiary.

Huguenin *v.* Basely, 14 *Ves.*, 271; Walmesley *v.* Booth, 2 *Atk.*, 27; Ayliffe *v.* Murray, 2 *Atk.*, 58; Moore *v.* Frowd, 3 *Myl. & C.*, 48; see Morse *v.* Royal, 12 *Ves.*, 371. Perhaps this rule should be more strongly expressed. Wright *v.* Proud, 15 *Ves.*, 138; Hatch *v.* Hatch, 9 *Ves.*, 296; But see Hunter *v.* Atkins, 3 *Myl. & K.*, 113, in which these cases are limited.

Trustee not to assume a trust adverse to interest of beneficiary.

§ 952. No trustee, so long as he remains in the trust, may undertake another trust adverse in its nature to the interest of his beneficiary, without the consent of the latter.

Trustee acquiring interest adverse to that of beneficiary.

§ 953. If a trustee acquires any interest adverse to that of his beneficiary in the subject of the trust, he must immediately inform the latter thereof, and may be at once removed.

Trustee guilty of a fraud, when.

§ 954. Every violation of the provisions of the preceding sections of this article by a trustee, is deemed a fraud.

Presumption against trustee.

§ 955. All transactions between a trustee and his beneficiary, during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence.

Morse *v.* Royal, 12 *Ves.*, 369; Randall *v.* Errington, 10 *Id.*, 429.

Trustee mingling trust property with his own.

§ 956. If the trustee wilfully and unnecessarily mingles the trust property with his own, so as to constitute himself in appearance its absolute owner, he is liable for its safety in all events.

Duffy *v.* Duncan, 32 *Barb.*, 593.

Trustee's responsibility for co-trustee.

§ 957. A trustee is not responsible for the acts of a co-trustee, in which he has had no part.

Lewin on Trusts, 302; Leigh *v.* Barry, 3 *Atk.*, 584; Townley *v.* Sherborne, *Bridgm.*, 35; Williams *v.* Nixon, 2 *Beav.*, 472.

## ARTICLE III.

### OBLIGATIONS OF THIRD PERSONS.

SECTION 958. Third person becoming involuntary trustee.
959. When third person must see to application of trust property.

Third person becoming involuntary trustee.

§ 958. One who acquires property held in trust, disposed of by a trustee contrary to his duty, holds the same as an involuntary trustee under such trust,[1] unless he purchases it for a valuable consideration, in good faith, and without notice of the trust.[2]

[1] Fisher *v.* Fields, 10 *Johns.*, 495; Shepherd *v.* McEvers, 4 *Johns. Ch.*, 136; Murray *v.* Ballou, 1 *id.*, 566.
[2] Day *v.* Roth, 19 *N. Y.*, 452.

When third person must see to application of trust property.

§ 959. One who actually and in good faith pays or delivers any money or other property to a trustee, as such, is not bound to see to the application of such money or property; and his rights can in no way be prejudiced by a misapplication of the same by the trustee.[1] Other persons must, at their peril, see to the proper application of money or other property paid or delivered by them.[2]

[1] 1 R. S., 730, § 66.
[2] The former law applied this rule to all persons.

# CHAPTER II.

## TRUSTS FOR THE BENEFIT OF THIRD PERSONS.

ARTICLE I. Nature and creation of the trust.
II. Obligations of the trustee.
III. Rights of the trustee.
IV. Termination of the trust.
V. Succession or appointment of new trustees.

## ARTICLE I.

### NATURE AND CREATION OF THE TRUST.

SECTION 960. Who are trustees within scope of this chapter
961. Creation of trust: Court, &c., as author of trust.

Who are trustees within scope of this chapter

§ 960. The provisions of this chapter apply only to express trusts, created for the benefit of another than the author of the trust, in which the title to the trust-property is vested in the trustee. Executors, administrators, committees of persons of unsound mind, and guardians of infants, as well as trustees heretofore strictly so called, and known as such in the late court of chancery, are trustees within the meaning of this chapter.

Creation of trust. Court, &c., as the author of trust

§ 961. The mutual assent of the author of the trust and the trustee creates a trust, of which the beneficiary may at any time take advantage,[1] until revoked, if revocable, by the author of the trust.

When a trustee is appointed by a court or public officer as such, such court or officer is the author of the trust, within the meaning of this section.

[1] Moses v. Murgatroyd, 1 *Johns. Ch.*, 119.

## ARTICLE II.

### OBLIGATIONS OF THE TRUSTEE.

SECTION 962. Trust, how executed.
963. Degree of care and diligence in execution of trust.
964. Duty of trustee as to appointment of successor.
965. Investment of money by trustee.
966. Interest, simple or compound, on omission to invest trust.
967. Purchase by trustee of claims against trust fund.

**Trust, how executed.**

§ 962. The trustee must fulfill the purpose of the trust, as declared at its creation.

**Degree of care and diligence in execution of trust**

§ 963. He must, whether he receives any compensation or not, use at least ordinary care and diligence in the execution of his trust.

**Duty of trustee as to appointment of successor.**

§ 964. If he procures or assents to his discharge from his office, before the trust is fully executed, he must use at least ordinary care and diligence to secure the appointment of a trustworthy successor before accepting his own final discharge.

**Investment of money by trustee.**

§ 965. He must invest money received by him under the trust, as fast as he collects a sufficient amount, in such manner as to afford reasonable security and interest for the same.

**Interest, simple or compound, on omission to invest trust moneys.**

§ 966. If the trustee omits to invest the trust moneys as prescribed by the last section, he must pay simple interest thereon, if such omission is negligent merely, and compound interest if it is wilful.

**Purchase by trustee of claims against trust fund.**

§ 967. The trustee cannot enforce any claim against the trust property which he purchases after or in contemplation of his appointment as trustee; but he may be allowed by any competent court to charge to the trust property, what he has in good faith paid for the claim, upon discharging the same.

## ARTICLE III.

### RIGHTS OF THE TRUSTEE.

SECTION 968. Compensation of trustee.

§ 968. The trustee is entitled to the same compensation as an executor,[1] and to the repayment of all expenses actually and properly incurred by him in the performance of his trust, to be paid out of the trust property.[2]

Compensation of trustee.

[1] This is the American rule.

[2] Worrall *v.* Harford, 8 *Ves.*, 8; Wilkinson *v.* Stuart, 2 *Sim. & Stu.*, 237.

## ARTICLE IV.

### TERMINATION OF THE TRUST.

SECTION 969. Trustee's office, how vacated.
970. Trustee, how discharged.
971. Removal by supreme court.

§ 969. The office of the trustee is vacated:

Trustee's office, how vacated.

1. By his death;
2. By his being adjudged to be of unsound mind;
3. By his discharge.

§ 970. The trustee can be discharged from his trust only as follows:

Trustee, how discharged.

1. By the completion of his duties under the trust;
2. By such means as may be prescribed by the author of the trust in its creation, or at any time while he retains control over it;
3. By the consent of the beneficiary, if he has capacity to contract;
4. By the supreme court.

§ 971. The supreme court may remove any trustee who has violated or is unfit to execute the trust.

Removal by Supreme Court.

1 R. S., 730; People *v.* Norton, 9 *N. Y.*, 176.

## ARTICLE V.

### SUCCESSION OR APPOINTMENT OF NEW TRUSTEES.

SECTION 972. Vacant trusteeship filled by court.
973. Survivorship between co-trustees.
974. Supreme court as trustee.

Vacant trusteeship filled by court.

§ 972. The supreme court may appoint a new trustee, whenever there is a vacancy, and the instrument creating the trust does not provide a practicable method of appointment.

1 R. S., 730, § 71; Leggett *v.* Hunter, 19 *N. Y.*, 459.

Survivorship between co-trustees.

§ 973. On the death of one of several co-trustees, the office survives to the others.

Lewin on Trustees, 299.

Supreme Court as trustee.

§ 974. When a trust exists without any appointed trustee, the supreme court must execute the office of trustee, until another trustee is appointed.

1 R. S., 730, § 68.

# TITLE X.

## AGENCY.

CHAPTER I. Agency in general.
II. Particular agencies.

## CHAPTER I.

### AGENCY IN GENERAL.

ARTICLE I. Agency, what, and how created.
II. Authority of the agent.
III. Mutual obligations of the principal and third persons.
IV. Obligations of the agent to third persons.
V. Delegation of agency.
VI. Termination of agency.

Under this head, the representation of one person by another is the only subject treated. The rights acquired by third persons against both the principal and the agent are here stated. The mutual relations of principal and agent are a branch of Employment, and are defined in the chapter on that subject. So far as these relations create a mutual trust, they are regulated by the chapter on Trusts.

## ARTICLE I.

### AGENCY, WHAT, AND HOW CREATED.

SECTION 975. Agency, defined.
976. Who may appoint and who may be an agent.
977. Agents, general or special.
978. Personal trust cannot be delegated to an agent.
979. Creation of agency.
980. Agency is actual or ostensible.
981. Ratification of agent's act.
982. Ratification of part of a transaction.
983. Ratification not to work injury to third persons.
984. Ratification by retaining benefit of agent's acts.
985. Rescission of ratification.

§ 975. An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called Agency. Agency, defined.

Who may appoint and who may be an agent.

§ 976. Any person, having capacity to contract, may appoint an agent;[1] and any person of sound mind may be an agent.[2]

[1] Story on Agency, § 6. See Bergman *v.* Howell, 3 *Abb. Pr.*, 329; Phillips *v.* Burr, 4 *Duer*, 113.

[2] Sto. Ag., § 7; Bac. Abr., *Authority*, B.; Hopkins *v.* Molineux, 4 *Wend.*, 465.

Agents, general or special.

§ 977. An agent for a particular act or transaction, is called a special agent. All others are general agents.

Story Ag., §§ 17–20. Is there any real importance in the distinction? See id., § 126, note.

Personal trust cannot be delegated to an agent.

§ 978. No personal trust can be delegated to an agent.

Story on Agency, §§ 11, 12.

Creation of agency.

§ 979. An agency may be created by an original authority, or a subsequent ratification;[1] and no consideration is necessary to make either binding upon the principal.[2]

[1] Newton *v.* Bronson, 13 *N. Y.*, 594; Moss *v.* Rossie Mining Co., 5 *Hill*, 137; Weed *v.* Carpenter, 4 *Wend.*, 219; Peterson *v.* Mayor of New York, 17 *N. Y.*, 453; Hoyt *v.* Thompson, 19 *id.*, 218.

[2] Commercial Bank *v.* Warren, 15 *N. Y.*, 577.

Agency is actual or ostensible.

§ 980. An agency may be actual or ostensible. It is actual, when the agent is really employed by the principal, and it is ostensible, when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent.

Ratification of agent's act.

§ 981. Ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified,[1] or by accepting the benefit of the act.[2]

[1] Story Ag., § 242; Despatch Line *v.* Bellamy, 12 *N. H.*, 232. See Newton *v.* Bronson, 13 *N. Y.*, 595; Blood *v.* Goodrich, 9 *Wend.*, 68; 12 *id.*, 525; Wells *v.* Evans, 20 *id.*, 251.

[2] Bennett *v.* Judson, 21 *N. Y.*, 238.

Ratification of part of a transaction.

§ 982. Ratification of part of an indivisible transaction is a ratification of the whole.

Farmers' Loan Co. *v.* Walworth, 1 *N. Y.*, 447; Story Ag., § 250. See Bennett *v.* Judson, 21 *N. Y.*, 238; Condit *v.* Baldwin, *id.*, 231.

§ 983. No unauthorized act can be made valid, retrospectively, to the prejudice of third persons, without their consent.

Ratification not to work injury to third persons.

This is a broader rule than perhaps at present exists. But great difficulty has been felt in attempting to reconcile the cases. See Story Ag., §§ 246, 247; Bird *v.* Brown, 4 *Exch.*, 786; Wilson *v.* Tumman, 6 *M. & G.*, 236; Palmer *v.* Stephens, 1 *Denio*, 481; Rossiter *v.* Rossiter, 8 *Wend.*, 499.

§ 984. The principal is deemed to ratify all the acts of his agent by retaining the benefit of such acts after notice thereof.

Ratification by retaining benefit of agent's acts.

Bennett *v.* Judson, 21 *N. Y.*, 238; Clarke *v.* Van Reimsdyck, 9 *Cranch*, 153.

§ 985. Ratification may be rescinded only when made with an imperfect knowledge of the facts of the transaction ratified.

Rescission of ratification.

Story on Agency, §§ 242, 250. See Commercial Bank *v.* Warren, 15 *N. Y.*, 577. Ratification without such knowledge is not binding. Seymour *v.* Wyckoff, 10 *N. Y.*, 213, 224; Cobb *v.* Dows, *id.*, 341.

## ARTICLE II.

### AUTHORITY OF THE AGENT.

SECTION 986. Measure of agent's authority, actual or ostensible.
987. Agent's authority as to persons having notice of restrictions upon it.
988. Agent's necessary authority.
989. Agent's power to disobey instructions.
990. Authority to be construed by its specific rather than by its general terms.
991. Construction of a general authority.
992. Agent can not have authority to defraud principal.
993. Authority to make contract under seal.
994. Authority to warrant principal's title, &c.
995. Authority of agent, general or special, to receive price of property.

§ 986. The agent has such authority as the principal actually or ostensibly confers upon him. Actual authority is such as the principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess. Ostensible

Measure of agent's authority actual or ostensible.

authority is such as he intentionally, or by want of ordinary care, causes or allows a third person to believe the agent to possess.[1]

[1] Farm. & Mech. B'k v. Butch. & Drov. B'k, 16 *N. Y.*, 125; Beaufort v. Neeld, 12 *Clark & Fin.*, 290; Sickens v. Irving, 7 *C. B.* (*N. S.*), 171, 173.

**Agent's authority as to persons having notice of restrictions upon it.**

§ 987. Every agent has ostensibly such authority as is defined by this article, except as to persons who have notice, or are bound to take notice, of restrictions upon his authority.

Dingle v. Hare, 7 *C. B.* (*N. S.*), 159.

**Agent's necessary authority.**

§ 988. An agent has authority to do everything necessary, or proper and usual in the ordinary course of business, for effecting the purpose of his agency.

Story on Agency, §§ 85, 86, 96, 97; Dingle v. Hare, 7 *C. B.* (*N. S.*), 159. See Horton v. Morgan, 19 *N. Y.*, 170; Waring v. Mason, 18 *Wend.*, 434; Graves v. Legg, 2 *H. & N.*, 210; Taylor v. Stray, 2 *C. B.*(*N S.*), 191; Pollock v. Stables, 12 *Q. B.*, 765; Bayliffe v. Butterworth, 1 *Exch.*, 428; Sutton v. Tatham, 10 *Ad. & El.*, 27; Bayley v. Wilkins, 7 *C. B.*, 886. See, however, Sweeting v. Pearce, 7 *C. B.* (*N. S.*), 449; Partridge v. Bank of England, 9 *Q. B.*, 396.

**Agent's power to disobey instructions.**

§ 989. Unless he is expressly deprived thereof, an agent has power to disobey instructions in dealing with the subject of the agency, in cases where it is clearly for the interest of his principal that he should do so, and there is not time to communicate with the principal.

Code La., 2975, 2980; Drummond v. Wood, 2 *Caines*, 310.

**Authority to be construed by its specific rather than its general terms.**

§ 990. When an authority is given partly in general, and partly in specific terms, the general authority gives no higher powers than those specifically mentioned.

Sto. Agency, § 71; Stair Inst., B. 1, t. 12, § 15.

**Construction of a general authority.**

§ 991. An authority expressed in general terms does not include an authority to define the scope of the agency.[1] Nor does it include an authority to the agent to act in his own name, unless it is the usual course of business to do so.[2]

[1] Supervisors of Rensselaer v. Bates, 17 *N. Y.*, 246; Mechanics' Bk. v. New Haven R. R., 13 *N. Y.*, 599; Grant v. Norway, 10 *C. B.*, 665; Coleman v. Riches, 16 *id.*, 104.

[2] Horton v. Morgan, 19 *N. Y.*, 170; Whitehouse v. Moore, 18 *Ala. Pr.*, 142.

§ 992. The agent can never have authority to defraud the principal.

Agent cannot have authority to defraud principal.

§ 993. An authority to enter into a contract under seal can only be given by an instrument under seal.

Authority to make contract under seal.

§ 994. An authority to sell personal property includes authority to warrant the principal's title, the quality and quantity of the property, and an authority to sell and convey real property includes authority to give the usual covenants of warranty.

Authority to warrant principal's title, &c.

Leroy *v.* Beard, 8 *How.* (*U. S.*), 451; Waring *v.* Mason, (Ct. of Errors), 18 *Wend.*, 434, see Milburn *v.* Belloni, 12 *Abb. Pr.*, 451; Sto. Agency, §§ 58, 59; Nelson *v.* Cowing, 6 *Hill*, 336. See, however, Brady *v.* Todd, 9 *C B.* (*N. S.*), 592.

§ 995. If the thing sold is put in the possession of the agent by the principal, a general agent to sell has authority to receive the price; and a special agent has authority to receive the price on delivery of the thing,[1] but not afterwards.

Authority of agent, general or special, to receive price of property.

[1] Peck *v.* Harriott, 6 *Serg. & R.*, 149.

## ARTICLE III.

### MUTUAL OBLIGATIONS OF THE PRINCIPAL AND THIRD PERSONS.

SECTION 996. Principal, how affected by acts of agent within the scope of his authority.
997. Knowledge of the principal is knowledge of the agent, &c.
998. Principal, when bound by incomplete execution of authority.
999. Obligation of principal, when agent exceeds his authority.
1000. Obligation of principal for acts done under a merely ostensible authority.
1001. Obligation of principal when exclusive credit is given to agent.
1002. Rights of persons who deal with agent without knowledge of his agency.
1003. Effect of a written instrument by which the agent intends to bind the principal.
1004. Principal's responsibility for agent's negligence or omission.
1005. Principal's responsibility for wrongs wilfully committed by the agent.

§ 996. The agent represents the principal for all purposes within the scope of his actual or ostensible[1] authority. All the rights[2] and liabilities[3] which would accrue to the agent

Principal how affected by acts of agent within the

scope of his authority.

from transactions within such limit,[4] if they had been entered into on his own account, accrue to the principal.

[1] Rourke v. Story, 4 *E. D. Smith*, 54; Hatch v. Taylor, 10 *N. H.*, 538; Farm. & M. B'k v. Butch. & Drov. B'k, 16 *N. Y.*, 125, 149.

[2] Story Agency, §§ 435, 438.

[3] Story Agency, § 127.

[4] See Condit v. Baldwin, 21 *N. Y.*, 219; Mechanics' Bank v. New Haven R. R., 13 *N. Y.*, 599, 634; Hubbersty v. Ward, 8 *Exch.*, 330; Coleman v. Riches, 16 *C. B.*, 104.

Knowledge of the principal is knowledge of the agent, &c.

§ 997. As against the principal, the agent is deemed to know whatever the principal knows,[1] and the principal to know whatever the agent, knowing, ought to communicate to him.[2]

[1] Fuller v. Wilson, 3 *Q. B.*, 58; Fitzsimmons v. Joslin, 21 *Vt.*, 129; see Cornfoot v. Fowke, 6 *M. & W.*, 386.

[2] Fulton Bank v. Sharon Canal Co., 4 *Paige*, 137; Bank of U. S. v. Davis, 2 *Hill*, 464; Stewart v. Stewart, 6 *Clark & Fin.*, 911. See Ingalls v. Morgan, 10 *N. Y.*, 184.

Principal, when bound by incomplete execution of authority

§ 998. The principal is bound by an incomplete execution of an authority only when it is consistent with the whole purpose and scope thereof.

Story Agency, §§ 171, 180.

Obligation of principal when agent exceeds his authority.

§ 999. When the agent exceeds his authority, the principal is bound by his authorized acts so far only as they can be plainly separated from those which are unauthorized.

For acts done under a merely ostensible authority.

§ 1000. The principal is bound by acts of the agent, under a merely ostensible authority, only to persons who have in good faith parted with value upon the faith thereof.

See Mechanics' Bank v. New Haven R. R., 13 *N. Y.*, 611; Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank, 16 *N. Y.*, 127.

When exclusive credit is given to agent.

§ 1001. If exclusive credit is given to the agent by the person dealing with him, the principal is exonerated by payment or other satisfaction made by him to his agent in good faith, before receiving notice of the creditor's election to hold him responsible.

Story Agency, § 291; Fish v. Wood, 4 *E. D. Smith*, 327. Compare Heald v. Kenworthy, 10 *Exch.*, 739.

Rights of person who deals with

§ 1002. One who deals with an agent, without knowing, or having reason to believe, that the agent acts as such in

the transaction, may set off against any claim of the principal arising out of the same, all claims which he might have set off against the agent before notice of the agency.

agent without knowledge of his agency.

Hogan *v.* Shorb, 24 *Wend.*, 458; George *v.* Clagett, 7 *T. R.*, 359; See Taintor *v.* Prendergast, 3 *Hill*, 72; Ferrand *v.* Bischoffsheim, 4 *C. B.* (*N. S.*), 710; Heald *v.* Kenworthy, 10 *Exch.*, 739; Smethurst *v.* Mitchell, *El. & El.*, 630.

§ 1003. Any instrument within the scope of the agent's authority, whether under seal or not, by which the agent intends to bind his principal, does so bind him, if such intent is plainly inferrable from the instrument itself.

Effect of a written instrument by which the agent intends to bind the principal.

This section belongs perhaps to the general subject of interpretation of contracts. It is intended to abolish the distinction in this respect between sealed and unsealed instruments. See Story Ag., §§ 147–155.

§ 1004. The principal is responsible to third persons, unless required by, or under the authority of, law, to employ that particular agent,[1] for the negligence of his agent in the transaction of the business of the agency,[2] and for his wilful omission to fulfill the obligations of the principal.[3]

Principal's responsibility for agent's negligence or omission.

[1] Story Agency, § 456.

[2] Sadler *v.* Henlock, 4 *E. & B.*, 570; Althorf *v.* Wolfe, 22 *N. Y.*, 355; Blake *v.* Ferris, 5 *N. Y.*, 48.

[3] Weed *v.* Panama R. R., 17 *N. Y.*, 362; Story Agency, § 453.

§ 1005. He is responsible for wrongs wilfully committed by his agent, only when he has authorized or ratified them,[1] even though they are committed while the agent is engaged in his service.[2]

Principal's responsibility for wrongs wilfully committed by the agent.

[1] Eastern C. R. R. *v.* Brown, 6 *Exch.*, 314; Chilton *v.* Croydon R. R., 16 *M. & W.*, 212; Maund *v.* Monmouth Canal Co., 4 *M. & G.*, 452.

[2] Story Ag., § 456; Church *v.* Mansfield, 20 *Conn.*, 284; Condit *v.* Baldwin, 21 *N. Y.*, 219; Richmond Turnpike Co. *v.* Vanderbilt, 2 *N. Y.*, 479; 1 *Hill*, 480.

## ARTICLE IV.

### OBLIGATIONS OF THE AGENT TO THIRD PERSONS.

SECTION 1006. Agent's responsibility to third persons.
1007. Obligation of agent to surrender property to third person.

Agent's responsibility to third persons.

§ 1006. An agent is responsible to third persons for his acts in the course of his agency, in the following cases only:[1]

1. When, with his consent, credit is given to him personally in a transaction;[2]

2. When his principal is not responsible for his acts,[3] and he has no right to suppose that his principal is thus responsible;[4]

3. When his acts are wrongful in their nature.[5]

[1] Story's Agency, §§ 261, 310. See Kirkpatrick *v.* Stainer, 22 *Wend.*, 244; Green *v.* Kopke, 18 *C. B.*, 549; Smout *v.* Ilbery, 10 *M. & W.*, 1.

[2] Sto. Ag., § 288. This provision includes the cases in which an agent does not disclose the fact of his agency (Waring *v.* Mason, 18 *Wend.*, 434; Sto. Ag., § 266); those in which the fact of the agency is known, but the principal is unknown (Mills *v.* Hunt, 20 *Wend.*, 431; Sto. Ag., § 267); or where the agent makes himself a party to the contract. (Higgins *v.* Senior, 8 *M & W.*, 834; Tanner *v.* Christian, 4 *E. & B.*, 591; Lennard *v.* Robinson, 5 *E. & B.*, 125; Pontz *v.* Stanton, 10 *Wend.*, 271.) In all cases the question is, "to whom was credit given?" (Green *v.* Kopke, 18 *C. B.*, 549; Mahony *v.* Kekulé, 14 *id.*, 390. See Kirkpatrick *v.* Stainer, 22 *Wend.*, 244.) This is true even concerning public agents who contract in their own names. (Sto. Ag., § 302.)

[3] This includes cases of unauthorized acts (Sto. Ag., § 264; Feeter *v.* Heath [Ct. of Errors], 11 *Wend.*, 477; Meech *v.* Smith, 7 *Wend.*, 315; Dusenbery *v.* Ellis, 3 *Johns. Cas.*, 70; Rossiter *v.* Rossiter, 8 *Wend.*, 494, See Palmer *v.* Stephens, 1 *Denio*, 471); and cases in which from public policy the principal is not liable. (Sto. Ag., § 319 *b.*)

[4] Smout *v.* Ilbery, 10 *M. & W.*, 1.

[5] Sto. Ag., §§ 311, 312.

Obligation of agent to surrender property to third person.

§ 1007. If an agent receives anything for the benefit of his principal, to the possession of which another person is entitled, he must, on demand, surrender it to such person.

or so much of it as he has under his control at the time of demand, on being indemnified for any advance which he has made to his principal, in good faith, on account of the same.

Story's Agency, § 300.

## ARTICLE V.

### DELEGATION OF AGENCY.

SECTION 1008. Agent's delegation of his powers.
1009. Agent's unauthorized employment of sub-agent.
1010. Sub-agent rightfully appointed, represents principal.

Agent's delegation of his powers.

§ 1008. An agent can delegate his powers to another person in the following cases only:[1]

1. When the act to be done is purely mechanical;[2]

2. When it is such as the agent cannot himself, and the sub-agent can, lawfully perform;[3]

3. When it is the usage of the place to delegate such powers;[4]

4. When such delegation is specially authorized by the principal;[5]

And in all cases the principal may forbid any delegation to be made.

[1] Ess *v.* Truscott, 2 *M. & W.*, 385; see Powell *v.* Tuttle, 3 *N. Y*, 396; Moffatt *v.* Wood, 5 *Seld. Notes*, 14; Newton *v.* Bronson, 13 *N. Y.*, 593.

[2] Commercial Bank *v.* Norton, 1 *Hill*, 501; see Powell *v.* Tuttle, 3 *N. Y.*, 407.

[3] Story Agency, § 14.

[4] Laussatt *v.* Lippincott, 6 *Serg. & R.*, 393; see Horton *v.* Morgan, 19 *N. Y.*, 170; Whitehouse *v.* Moore, 13 *Abb. Pr.*, 142; Pollock *v.* Stables, 12 *Q. B.*, 765.

[5] Sto. Agency, § 14.

Agent's unauthorized employment of sub-agent.

§ 1009. If an agent employs a sub-agent without authority, the former is a principal, and the latter his agent, and the principal of the former has no connection with the latter.

Story Agency, § 217 *a*; Code of La., 2976.

Sub-agent rightfully appointed represents principal.

§ 1010. A sub-agent, lawfully appointed, represents the principal in like manner with the original agent.

See Althorf *v.* Wolfe, 22 *N. Y.*, 355; Sadler *v.* Henlock 4 *E. & B.*, 570, 578.

## ARTICLE VI.

### TERMINATION OF THE AGENCY.

SECTION 1011, 1012. Termination of agency.

Termination of agency.

§ 1011. The agency is terminated as to every person having notice[1] of

1. The expiration of its term;
2. The extinction of its subject;
3. The death of the agent; or,
4. The incapacity of the agent to act as such.

[1] Vail *v.* Judson, 4 *E. D. Smith*, 165.

Id.

§ 1012. Unless the power of the agent is coupled with an interest in the subject of the agency,[1] it is also terminated as to every person having notice[2] of

1. Its revocation by the principal;
2. His death[3]; or,
3. His incapacity to contract.[4]

[1] Knapp *v.* Alvord, 10 *Paige*, 205; see Hunt *v.* Rousmaniere, 8 *Wheat.*, 174.

[2] Cassiday *v.* McKenzie, 4 *Watts & Serg.*, 282. It may be doubted whether this clause is at present law in this State (see Houghtailing *v.* Marvin, 7 *Barb.*, 412), as it certainly is not in England (Blades *v.* Free, 9 *B. & C.*, 167); but, if not, it ought to be, in order to avoid the injustice of which Smout *v.* Ilbery (10 *M. & W.*, 1), furnishes a striking example.

[3] Blades *v.* Free, 9 *B. & C.*, 167.

[4] Story on Agency, §§ 485, 486. Insanity, not judicially declared, has been held to be no revocation (Wallis *v.* Manhattan Bank, 2 *Hall*, 495); but this was on the ground that otherwise the authority would be thereby revoked *without* notice, an objection which this section obviates.

# CHAPTER II.

## PARTICULAR AGENCIES.

ARTICLE I. Auctioneers.
II. Factors.
III. Shipmasters.

## ARTICLE I.

### AUCTIONEERS.

SECTION 1013. Auctioneer's authority from the seller.
1014. Auctioneer's authority from the bidder.

Auctioneer's authority from the seller.

§ 1013. An auctioneer, in the absence of special authority or usage to the contrary, has authority from the seller, only as follows:

1. To sell by public auction to the highest bidder;[1]
2. To sell for cash only,[2] except such articles as are usually sold on credit;
3. To warrant, in like manner with other agents to sell, according to § 994.[3]
4. To prescribe reasonable rules and terms of sale;[4]
5. To deliver the thing sold, upon payment of the price;[5]
6. To collect the price;[6]
7. To do whatever else is necessary, or proper and usual, in the ordinary course of business, for effecting these purposes.

[1] Sto. Agency, § 108.
[2] Sto. Agency, §§ 60, 108.
[3] Sto. Agency, § 107.
[4] Sto. Agency, § 107.
[5] Brown *v.* Staton, 2 *Chitt.*, 353.
[6] Minturn *v.* Main, 7 *N. Y.*, 227.

Auctioneer's authority from the bidder.

§ 1014. He has authority from a bidder at the auction, as well as from the seller, to bind both by a memorandum of the contract as prescribed in the title on SALE.

## ARTICLE II.

### FACTORS.

SECTION 1015. Factor defined.
1016. Actual authority of factor.
1017. Ostensible authority.

Factor defined.

§ 1015. A factor is an agent, who is employed to buy or sell property in his own name, and who is entrusted by his principal with the possession thereof.

Authority of factor.

§ 1016. In addition to the authority of agents in general, a factor has actual authority from his principal, unless specially restricted:

1. To insure property consigned to him uninsured;[1]

2. To sell, on credit, anything entrusted to him for sale,[2] except such things as are never sold on credit by dealers of ordinary prudence;[3] but not to pledge,[4] mortgage, or barter[5] the same;

3. To delegate his authority to his partner or servant,[6] but not to any person in an independent employment.[7]

[1] Brisban *v.* Boyd, 4 *Paige*, 17.

[2] Van Alen *v.* Vanderpool, 6 *Johns.*, 72; Laussatt *v.* Lippincott, 6 *Serg. & R.*, 386.

[3] See Sto. Agency, § 110; Delafield *v.* Illinois, 26 *Wend.*, 192; 2 *Hill*, 159.

[4] Buckley *v.* Packard, 20 *Johns.*, 421; Rodriguez *v.* Heffernan, 5 *Johns. Ch.*, 429.

[5] Guerriero *v.* Peile, 3 *B. & A.*, 616.

[6] This seems to be reasonable, and is unquestionably the universal custom.

[7] Moffatt *v.* Wood, 5 *Seld. Notes*, 14.

Ostensible authority.

§ 1017. He has ostensible authority, as to persons having no notice that the property with which he deals is not his own, to deal with it in any manner.[1]

[1] See title on PLEDGE.

## ARTICLE III.

### SHIPMASTERS.

SECTION 1018. Authority of shipmaster.
1019. Personal liability for contracts relative to the ship.
1020. Liability for acts of persons employed upon the ship.
1021. Responsibility for negligence of pilot.
1022. Powers on the voyage.
1023. Power to make contracts.
1024. Power to charter ship in foreign port.
1025. Power to hypothecate ship or sell part of the cargo.
1026. Engagement to ransom ship binds ship, freight money and cargo.
1027. Authority to sell the ship and cargo.
1028. Abandonment terminates master's power.

Authority of shipmaster.

§ 1018. A shipmaster is a general agent for the owner of his ship in all matters concerning the same. He has authority, if it is necessary to enable him to complete his voyage, and neither the owner of the ship nor his proper agent for such matters can be consulted without injurious delay, to borrow money on the credit of the ship.

The Fortitude, 3 *Sumn.*, 228; Weston *v.* Wright, 7 *M. & W.*, 396; Arthur *v.* Barton, 6 *id.*, 138. See Beldon *v.* Campbell, 6 *Exch.*, 886.

Personal liability for contracts to the ship.

§ 1019. Unless otherwise expressly agreed,[1] or unless the contracting parties give exclusive credit to the owner,[2] the master is personally liable upon his contracts relative to the ship, even when the owner is also liable.

[1] Story Ag., § 294.
[2] *Id.*, § 296.

Liability for acts of persons employed upon the ship.

§ 1020. He is liable to third persons for the acts or negligence of persons employed upon the vessel, who are not appointed by him, to the same extent as if they were.

Denison *v.* Seymour, 9 *Wend.*, 8.

Responsibility for negligence of pilot.

§ 1021. He is not responsible for the negligence of a pilot whom he is bound by law to employ, but if he is allowed an option between pilots, or required only to pay compensation to a pilot whom he does not choose to employ, he is so responsible.

Story Ag., § 456, note.

Power to make contracts.

§ 1022. The master may procure all necessary repairs and supplies for the ship, and may engage goods and passengers for carriage, and his contracts for these purposes, bind the owner or other person mentioned in section to the full amount of the value of the ship and freight.

3 Kent Com., 161.

Powers on the voyage.

§ 1023. The master during the voyage has command of the ship, of the crew and of all on board, being responsible for the abuse of his command.

Power to charter ship in foreign port.

§ 1024. In a foreign port the master may bind the ship and freight-money by a charter-party.

3 Kent Com., 162.

Power to hypothecate ship or sell part of cargo.

§ 1025. The master of a foreign ship, in the absence of the owners, or a majority of them, may, if necessary, hypothecate the freight-money as well as the ship, to raise money requisite for the completion of the voyage; and he may also sell a part of the cargo for the same purpose.

3 Kent Com., 172, 173.

Engagement to ransom ship, bind ship, freight money and cargo.

§ 1026. In case of capture of the ship, the master may engage to pay a ransom for it in money or in part of the cargo, and his engagement will bind the ship, freight money and cargo.

Ib.

Authority to sell the ship and cargo.

§ 1027. If the voyage is broken up beyond the possibility of pursuing it, the master may sell the ship and cargo for the benefit of the owners.

Ib.

Abandonment terminates master's power.

§ 1028. The power of the master to bind the owner, ceases upon the abandonment of the ship and freight money to insurers.

3 Kent, 331.

# TITLE XI.

## PARTNERSHIP.

CHAPTER I. Partnership in general.
II. General Partnership.
III. Special Partnership.

## CHAPTER I.

### PARTNERSHIP IN GENERAL.

ARTICLE I. Partnership, what, and how formed.
II. Partnership property.
III. Mutual obligations of partners.
IV. Renunciation of partnership.

## ARTICLE I.

### PARTNERSHIP, WHAT, AND HOW FORMED.

SECTION 1029. Partnership defined.
1030. Formation of partnership.

Partnership defined.

§ 1029. The contract of partnership is an agreement between two or more persons to divide between them the profits and losses of any business[1] in which a single person may lawfully engage.

[1] Reynolds *v.* Cleveland, 4 *Cow.*, 282; Porter *v.* McClure, 15 *Wend.*, 187.

Formation of partnership.

§ 1030. Partnership can be formed only by the consent of all the parties thereto, and therefore no new partners can be admitted without the consent of every member of the firm.

Story on Partn., § 5.

## ARTICLE II.

### PARTNERSHIP PROPERTY, AND INTERESTS OF THE PARTNERS THEREIN.

SECTION 1031. Partnership property, defined.
1032. Partner's interest in partnership property.
1033. Partner's share in profits and losses.
1034. Partner may require application of partnership property to payment of debts.
1035. Real property of partnership.

Partnership property, defined.

§ 1031. The partnership property consists of all that is contributed to the common stock at the formation of the partnership, and of all that is subsequently acquired by the partnership.

Code Napoleon, art. 1839.

Partner's interest in partnership property.

§ 1032. The interest of each partner extends to every portion of the partnership property.

Sto. on Part., § 16; 2 Blacks. Com., 182.

Partner's share in profits and losses.

§ 1033. In the absence of any agreement on the subject, the shares of the partners in the profit or loss of the business are equal,[1] and each partner's share of the property of the firm is the value of his original contribution, increased or diminished by his share of profit or loss.[2]

[1] Gould *v.* Gould, 6 *Wend.*, 263; Robinson *v.* Anderson, 7 *De G., M. & G.*, 239; 20 *Beav.*, 98.

[2] The cases upon this point are not clear, but the rule here stated appears to be just.

Partner may require application of partnership property to payment of debts.

§ 1034. Each partner may require the partnership property to be applied to the discharge of the partnership debts, and has a lien upon the shares of the other partners for this purpose.

Skip *v.* Harwood, 2 *Swanst.*, 586; West *v.* Skip, 1 *Ves., Sr.*, 239; Doddington *v.* Hallett, *id.*, 498; *Exp.* Ruffin, 6 *Ves.*, 119; *Exp.* Williams, 11 *id.*, 3; Holderness *v.* Shackels, 8 *B. & C.*, 612.

Real property of partnership

§ 1035. The real property of the partnership is held by the same title, and governed by the same rules, as personal property, except as to transfers thereof.

## ARTICLE III.

### MUTUAL OBLIGATIONS OF PARTNERS.

SECTION 1036. Partners trustees for each other.
1037. Good faith to be observed between partners.
1038. Mutual liability of partners to account.
1039. No compensation for services to firm.

Partners trustees for each other.

§ 1036. The relations of partners are confidential. They are trustees for each other, within the meaning of chapter I of the title on TRUSTS. Their obligations, as such trustees, are defined by that chapter.

Good faith to be observed between partners.

§ 1037. In the formation[1] and conduct[2] of the partnership, and in all proceedings connected with its dissolution and liquidation,[3] every partner is bound to act in the highest good faith[4] toward his co-partners. He may not obtain any advantage over them in the partnership affairs by the slighest misrepresentation, concealment, threat, or adverse pressure of any kind.[5]

[1] Hichens *v.* Congreve, 1 *R. & Myl.*, 150; Fawcett *v.* Whitehouse, *id.*, 132; Beck *v.* Kantorowicz, 3 *Kay & J.*, 230.

[2] Code Justin., IV., 37, 3; Burton *v.* Wookey, 6 *Madd.*, 367.

Blisset *v.* Daniel, 10 *Hare*, 493, 522, 536; Perens *v.* Johnson, 3 *Sma. & G.*, 419; Maddeford *v.* Austwick, 1 *Sim.*, 89; affirmed, 2 *Myl. & K.*, 279; Chandler *v.* Dorsett, *Finch*, 431; Featherstonhaugh *v.* Fenwick, 17 *Ves.*, 298; Anderson *v.* Lemon, 8 *N. Y.*, 236.

Mutual liability of partners to account.

§ 1038. Each partner must account to the partnership for everything that he receives on account thereof, and is entitled to receive from it everything that he properly expends for the benefit thereof, and to be indemnified for all losses and risks which he necessarily incurs on its behalf.

Pothier on Partnership, 127–130; Croxton's case, 5 *De G. & Sm.*, 432; Sedgwick's case, 2 *Jur.* (*N. S.*), 949; Chippendale's case, 4 *De G., M. & G.*, 19.

No compensation for services to firm.

§ 1039. In the absence of an agreement on the subject, no partner is entitled to any compensation for services rendered by him to the partnership.

Coursen *v.* Hamlin, 2 *Duer*, 513; Caldwell *v.* Lieber, 7 *Paige*, 483; Bradford *v.* Kimberly, 3 *Johns. Ch.*, 434; Franklin *v.* Robinson, 1 *id.*, 165.

## ARTICLE IV.

### RENUNCIATION OF PARTNERSHIP.

SECTION 1040. Renunciation of future profits exonerates from future liability.
1041. Effect of renunciation.

Renunciation of future profits exonerates from liability.

§ 1040. A partner may exonerate himself from all future liability to a third person on account of the partnership, by renouncing, in good faith, all participation in its future profits, and giving notice thereof to such third person, and to his own co-partners.

Effect of renunciation.

§ 1041. After such renunciation, the renouncing partner cannot claim any profits of the partnership, and his co-partners may proceed, as with his consent, to dissolve the partnership.

# CHAPTER II.

## OF GENERAL PARTNERSHIP.

ARTICLE I. What is a general partnership.
II. Powers and authority of partners.
III. Mutual obligations of partner.
IV. Liability of partners.
V. Termination of partnership.
VI. Of the use of fictitious names.

## ARTICLE I.

### WHAT IS A GENERAL PARTNERSHIP.

SECTION 1042. General partnership, what.

General partnership, what.

§ 1042. Every partnership that is not formed in accordance with the law concerning special partnership, is a general partnership.

## ARTICLE II.

### POWERS AND AUTHORITY OF PARTNERS.

SECTION 1043. Power of majority of partner.
1044. Authority of individual partner.
1045. Assignment of partnership property.

§ 1043. Unless otherwise expressly stipulated, the decision of the majority of the partners binds the partnership in the conduct of its business.

Power of majority of partners.

Such decision is binding in the due course of the business, (Kent *v.* Jackson, 2 *De G., M. & G.*, 49; 14 *Beav.*, 367; Bryon *v.* Met. Sal. Omn. Co., 3 *De G. & J.*, 123,) and in nothing else. (Natusch *v.* Irving, *Gow on Partn.*, 398; Bagshaw *v.* Eastern Union R. R., 7 *Hare*, 114; 2 *Macn. & G.*, 389; Simpson *v.* Denison, 10 *Hare*, 51; Const *v.* Harris, *Turn. & R.*, 496; York & N. Mid. R. R. *v.* Hudson, 16 *Beav.*, 485; Hodgkinson *v.* National Live Stock Ins. Co., 5 *Jur.* [*N. S.*], 478, 969.)

§ 1044. Each partner is a general agent for the partnership in the transaction of its business, and has authority, in the absence of any contrary agreement, to do whatever is necessary to carry on such business in the ordinary manner.

Authority of individual partner.

See Brettel *v.* Williams, 4 *Exch.*, 630; Dickinson *v.* Valpy, 10 *B. & C.*, 128; Ricketts *v.* Bennett, 4 *C. B.*, 686; Ex parte Chippendale, 4 *De G., M. & G.*, 19; Harman *v.* Johnson, 2 *Ell. & B.*, 61; Brown *v.* Kidger, 3 *H. & N.*, 853.

§ 1045. An assignment of the whole of the partnership property, in trust for the benefit of creditors, can only be made with the consent of all the partners who can be consulted.

Assignment of partnership property.

Pettee *v.* Orser, 6 *Bosw.*, 123; Wetter *v.* Schlieper, 4 *E. D. Smith*, 707; Deming *v.* Colt, 3 *Sandf.*, 284; Havens *v.* Hussey, 5 *Paige*, 30; Hayes *v.* Heyer, 3 *Sandf.*, 293; Fisher *v.* Murray, 1 *E. D. Smith*, 341; Ormsbee *v.* Davis, 5 *R. I.*, 442. See Mabbett *v.* White, 12 *N. Y.*, 442.

## ARTICLE III.

### MUTUAL OBLIGATIONS OF PARTNERS.

SECTION 1046. Profits of individual partner.
1047. Duty of individual partner.
1048. Must account to the firm for profits.

**Profits of individual partner.**

§ 1046. In the absence of any agreement on the subject, all profits made by a partner in the course of any business usually carried on by the partnership, belong to the firm.

See Russell *v.* Austwick, 1 *Sim.*, 52.

**Duty of individual partner.**

§ 1047. No partner, who has undertaken to give his personal attention to the busines of the partnership, may engage in any business on his own account which conflicts with that of the partnership, or which prevents him from giving to such business all the attention which would be advantageous to it.

See Lock *v.* Lynam, 4 *Ir. Eq.*, 188; Glassington *v.* Thwaites, 1 *Sim. & Stu.*, 124; England *v.* Curling, 8 *Beav.*, 129. The rule does not seem to be justly applicable to partners who contribute property only to the firm, unless in peculiar cases, which are sufficiently provided for in the general rule.

**Must account to the firm for profits.**

§ 1048. If a partner transacts business on his own account, without the knowledge or without the consent of his partners, which he could not have transacted, without the facilities afforded him by the partnership, he may be required by any partner to account to it for the profits of such business.

Russell *v.* Austwick, 1 *Sim.*, 52.

## ARTICLE IV.

### LIABILITY OF PARTNERS.

SECTION 1049. Liability of partners to third persons and to each other.
1050. Person liable as a partner.
1051. Person not liable as a partner.

**Liability of partners to third persons and to each other.**

§ 1049. The liability of partners to third persons is the same as that of other joint debtors. Their liability for each other's acts is defined by the title on AGENCY.

050. Any one representing himself, or permitting :lf to be represented, as a partner,[1] or receiving, or vol- ily acquiring a right to receive, a share of the net profits partnership business,[2] is liable to third persons as a er.

Person liable as partner.

[1] Story on Partn., §§ 64, 65; Stearns *v.* Haven, 14 *Vt.*, 540; Griswold *v.* Waddington, 15 *Johns.*, 57; Whitman *v.* Leonard, 3 *Pick.*, 177.

[2] Wood *v.* Vallette, 7 *Ohio* (*N. S.*), 172; Grace *v.* Smith, 2 *W. Blacks.*, 998; Waugh *v.* Carver, 2 *H. Blacks.*, 235; Bond *v.* Pittard, 3 *M. & W.*, 357; Cheap *v.* Cramond, 4 *B. & Ald.*, 663. But this rule is most earnestly condemned by the best writers on the subject (Story on Partn., § 36; Lindley on Partn., 40, and note), it has been declared to be a bad rule by eminent judges (see French *v.* Styring, 2 *C. B.* [*N. S.*], 362; Cox *v.* Hickman, 9 *id.*, 63); and its very foundation seems to be shaken by the House of Lords. (Cox *v.* Hickman, 9 *C. B.* [*N. S.*], 47.)

051. An agreement for a share in the gross receipts business,[1] or for a compensation for services[2] or the f property,[3] to be equal to a specified proportion of rofits, does not of itself constitute a partnership, or the liability mentioned in the last section.

Person not liable as partner.

[1] Story on Cont., § 207; Lindl. on Partn., 38; see Heyhoe *v.* Burge, 9 *C. B.*, 431.

[2] Vanderburgh *v.* Hall, 20 *Wend.*, 70; Rawlinson *v.* Clarke, 15 *M. & W.*, 292; Pott *v.* Eyton, 3 *C. B.*, 32; Loomis *v.* Marshall, 12 *Conn.*, 69; Burckle *v.* Eckhart, 3 *N. Y.*, 132; 1 *Den.*, 337; Brockway *v.* Burnap, 16 *Barb.*, 309.

[3] Heimstreet *v.* Howland, 5 *Denio*, 68.

## ARTICLE V.

### TERMINATION OF THE PARTNERSHIP.

ON 1052. Duration of partnership.
1053. Dissolution of partnership.
1054. Partner entitled to dissolution.

052. If no term is prescribed by agreement, for the on of the partnership, it continues until dissolved by ner or by operation of law.

Duration of partnership.

Dissolution of partnership.

§ 1053 The partnership is dissolved:

1. By lapse of the time prescribed by agreement, for its duration;

2. By the will of any partner, if there is no such agreement;

3. By the death of a partner;

4. By the transfer, to a person not a partner, of the interest of any partner in the partnership property;[1]

5. By war or the prohibition of commercial intercourse between the country in which one partner resides, and that in which another resides.[2]

[1] Heath *v.* Sansom, 4 *B. & Ad.*, 175; Johnson *v.* Evans, 7 *M. & G.*, 240; Habershon *v.* Blurton, 1 *De G. & Sm.*, 121; Nerot *v.* Burnand, 4 *Russ.*, 247; Marquand *v.* N. Y. Manufacturing Co., 17 *Johns.*, 525.

[2] Griswold *v.* Waddington, 16 *Johns.*, 490; 15 *id.*, 57.

Partner entitled to dissolution.

§ 1054. Any partner is entitled to a judgment dissolving the partnership,

1. When he, or another partner, becomes legally incapable of contracting;[1]

2. When another partner fails to perform his duties under the agreement of partnership, or is guilty of serious misconduct;[2]

3. When the business of the partnership can be carried on only at a permanent loss.[3]

[1] Jones *v.* Noy, 2 *Myl. & K.*, 125; Leaf *v.* Coles, 1 *De G., M. & G.*, 171.

[2] Harrison *v.* Tennant, 21 *Beav.*, 482.

[3] Jennings *v.* Baddelay, 3 *Kay & J.*, 78.

## ARTICLE VI.

### OF THE USE OF FICTITIOUS NAMES.

SECTION 1055. Fictitious name.
1056. Style of foreign partnership.
1057. Continuation of style of firm having foreign business relations.
1058. Certificate stating names, &c., of persons using such firm name to be filed and published.
1059. Register of such firms to be kept by county clerk.
1060. Certified copies from register and affidavits of publication to be evidence.

Fictitious name.

§ 1055. No partnership or person may transact business by a fictitious name, or in the name of a person not interested in such business,[1] except as prescribed in this article.

[1] 3 R. S. (5th ed.), 978; Laws 1833, ch. 281.

Style of foreign partnership

§ 1056. Commercial partnerships, established and transacting business in places without the United States, may use their partnership names or firms in this State.[1]

[1] 3 R. S. (5th ed.), 978; Laws 1849, ch. 347. What does it mean?

Continuation of style of firm having foreign business relations.

§ 1057. The name of a partnership which has had business relations with places without the United States may be continued in use by the persons succeeding to its business, and by their successors, upon compliance with the provisions of this article,[1] and with the consent of the persons, if living, whose names are used.[2]

[1] 3 R. S. (5th ed.), 66; Laws 1854, ch. 400. The words "foreign countries" are made more explicit.

[2] New, perhaps implied before.

Certificates stating names, &c., of persons using such firm name to be filed and published.

§ 1058. On every change of the persons continuing such use of a partnership name, the person acquiring the right to use it must sign and acknowledge before a proper officer for that purpose, a certificate stating the name of each person dealing under such name, and his place of residence, and must file the same with the clerk of the county in which their principal place of business is situated, and must publish such certificate, or a statement containing [illegible] thereof, once in each week, for four succes-

sive weeks, beginning within one week after his first using such name, in the state paper, and in a newspaper printed in the town in which such principal place of business is situated, or, if no newspaper is printed in such town, in one printed in the county town of the county.[1]

[1] 3 R. S. (5th ed.), 67; Laws 1854, ch. 400.

Register of such firms to be kept by county clerks.

§ 1059. The county clerk must keep a register of such names, entering in alphabetical order the name of every such partnership, and of each partner therein.

Certified copies from register and affidavit of publication to be evidence.

§ 1060. Copies of the entries of the county clerk as herein directed, when certified by him, and affidavits of publication as herein directed, made by the printer, publisher or chief clerk of a newspaper, are presumptive evidence of the facts therein contained.[1]

[1] 3 R. S. (5th ed.), 67; Laws 1854, ch. 400.

## CHAPTER III.

### OF SPECIAL PARTNERSHIP.

ARTICLE I. Formation of the partnership.
II. Powers, rights and duties of the partners.
III. Liability of partners.
IV. Alteration and dissolution of the partnership.

## ARTICLE I.

### FORMATION OF THE PARTNERSHIP.

SECTION 1061. When allowed.
1062. How formed.
1063. Certificate of special partnership, contents of.
1064. Proof of certificate.
1065. Certificate to be filed and recorded.
1066. Affidavit of actual payment of capital by special partners to be filed.
1067. Special partnership, when formed.
1068. Publication of certificate.
1069. Affidavit of publication.
1070. Effect of omission or informality of publication.
1071. Renewal of special partnership to be certified and published.

When allowed.

§ 1061. Special partnerships, for the transaction of any[1] business[2] except banking or insurance, may be formed by

two or more persons in the manner and with the effect herein prescribed.[3]

[1] The words "mercantile, mechanical, or manufacturing," omitted.

[2] The words "within this state" omitted.

[3] 1 R. S., 764, § 1.

Constitution of.

§ 1062. A special partnership may consist of one or more persons, called general partners, and one or more persons called special partners.

Certificate of special partnership contents of.

§ 1063. Persons desirous of forming a special partnership must severally sign a certificate, stating:

1. The name under which such partnership is to be conducted;

2. The general nature of the business intended to be transacted;

3. The names of all the partners, and their residences, specifying which are general, and which are special partners;

4. The amount of capital which each special partner has contributed to the common stock;

5. The periods at which such partnership will begin and end.

Proof of certificate.

§ 1064. Such certificate must be acknowledged or proved, as to the several persons signing the same, in the same manner as a transfer of real property.

1 R. S., 764; Laws 1837, ch. 129.

Certificate to be filed and recorded.

§ 1065. Such certificate, when duly acknowledged and certified, must be filed with the clerk of the county in which the partnership is to have its principal place of business, and must be recorded by him at large, in a book kept for that purpose, open to public inspection. A transcript of the same, duly certified by such clerk under his official seal, must be filed and recorded in like manner in the office of the clerk of every county in which such partnership has a place of business.

1 R. S., 764, 765.

Affidavit of actual payment of capital by special

§ 1066. An affidavit of one or more of the general or special partners, stating that the sums specified in the certificate as having been contributed by each of the special

partner to be filed.

partners, have been actually and in good faith paid in cash, must be filed in the same office with the original certificate.

1 R S., 765, § 7, omitting the words "At the time of filing the original certificate," which appear to be unnecessary and embarrassing, it being sufficient to provide that the partnership is not formed until the affidavit is filed.

Special partnership when formed.

§ 1067. No special partnership is formed, until the provisions of the last four sections are complied with.

1 R. S., 765, § 8.

Publication of certificate.

§ 1068. The certificate heretofore mentioned, or a statement of its substance, must be published in two or more newspapers, designated by the clerk with whom the original certificate is filed, and published in his judicial district. Such publication must be made once a week for six weeks, beginning within one week from the time of filing the certificate.

1 R. S., 765, § 9, as construed, Bowen *v.* Argall, 24 *Wend.*, 501; and modified by inserting "judicial" in place of "senate" district, according to the spirit of the statute as originally framed.

Affidavit of publication

§ 1069. Affidavits of such publication made by the printer, publisher or chief clerk of a newspaper, may be filed with such county clerk, and are presumptive evidence of the facts therein contained.

1 R. S., 765, § 10.

Effect of omission or informality of publication.

§ 1070. If such publication is not made, the partnership is general from its beginning. But if, from any cause beyond the control of the partners, the publication is not made in exact conformity with section 1068, it is sufficient if made as nearly in conformity therewith as may be in their power.

Renewal of special partnership to be certified and published.

§ 1071. Every renewal or continuance of a special partnership must be certified, recorded, verified and published in the same manner as upon its original formation.

1 R. S., 765, § 11.

## ARTICLE II.

### POWERS, RIGHTS AND DUTIES OF THE PARTNERS.

SECTION 1072. Firm name, how composed.
1073. Authority of special partner.
1074. His relation to his co-partners; rights in respect to money loaned to the firm.
1075. Special partner need not be joined in suit with general partners.
1076. May not withdraw his capital.
1077. Capital withdrawn to be restored.
1078. Certain transfers of property, void.

**Firm name, how composed.**

§ 1072. The business of the partnership must be conducted under a name, consisting of the names of one or more of the general partners only, without the addition of the word "company," or any other general term.

1 R. S., 765, § 13.

**Authority of special partner.**

§ 1073. The general partners only have authority to transact the business of the partnership. The special partners may negotiate business for it, subject to the subsequent approval of a general partner, but must not act on its behalf in any other manner.

3 R. S. (5th ed.), 64; Laws 1857, ch. 414.

**His relation to his co-partners; rights in respect to money loaned to the firm.**

§ 1074. A special partner may at all times investigate the partnership affairs, and advise his partners or their agents as to their management.[1] He may also lend money to the partnership, or advance money for it, and take from it security therefor, and as to such loans or advances has the same rights as any other creditor[2]; but, in case of the insolvency of the partnership, all other claims which he may have against it must be postponed until all other creditors are satisfied.[3]

[1] 1 R. S., 766, § 17.
[2] 3 R. S. (5th ed.), 64, § 17; Laws 1857, ch. 414.
[3] 1 R. S., 767, § 23.

**Special partner need not be joined in suit with general partners.**

§ 1075. The general partners may sue and be sued alone, in all matters relating to the partnership, in the same manner as if there were no special partners.

1 R. S., 766, § 14.

May not withdraw his capital.

§ 1076. No special partner may, under any pretense, withdraw any part of the capital invested by him in the partnership during its continuance. He may receive such lawful interest, and such proportion of profits, as may be agreed upon, if not paid out of capital invested in the partnership by him[1] or some other special partner,[2] and is not bound to refund the same to meet subsequent losses.[3]

[1] 1 R. S., 766, § 15.

[2] This addition is manifestly just. Should not the special partner be prohibited from drawing interest when no profits have been earned?

[3] Code of La., 2814.

Capital withdrawn to be restored.

§ 1077. If any special partner withdraws capital from the firm, contrary to the provisions of the last section, he must restore the same with interest.

1 R. S., 766, § 16.

Certain transfers of property, void.

§ 1078. Every transfer of the property of a special partnership or of a partner therein, made after or in contemplation of the insolvency of such partnership or partner, with intent to give a preference to any creditor of such partnership or partner, over any other creditor of such partnership, is void as against the creditors thereof; and every judgment confessed, lien created, or security given, in like manner and with the like intent, is in like manner void.

1 R. S., 766, §§ 20, 21,

## ARTICLE III.

### LIABILITY OF PARTNERS.

SECTION 1079. Liability of general partner in special partnership.
1080. Liability of special partner: what acts render him a general partner.

Liability of general partner in special partnership

§ 1079. The general partners in a special partnership are liable to the same extent as partners in a general partnership.

Liability of special partner.

§ 1080. The contribution of a special partner to the capital of the firm, and the increase thereof, is liable for its

debts, but he is not otherwise liable therefor[1] except as follows:

what acts render him a general partner.

1. If he has wilfully made or permitted a false or materially defective statement in the certificate of the partnership, the affidavit filed therewith, or the published announcement thereof, he is liable as a general partner to all creditors of the firm;[2]

2. If he has wilfully interfered with the business of the firm, except as permitted by § 1073 and § 1074, he is liable in like manner;[3]

3. If he has wilfully joined in, or assented to, an act contrary to any of the provisions of § 1072 and § 1078, he is liable in like manner;[4]

4. If he has unintentionally done any of these acts, he is liable as a general partner to any creditor of the firm who has been actually misled thereby to his prejudice.[5]

[1] 1 R. S., 764, § 2. [2] 1 R. S., 765, § 8.
[3] 1 R. S., 766, § 17. [4] 1 R. S., 767, § 22.
[5] See Bowen *v.* Argall, 24 *Wend.*, 501; Madison County Bank *v.* Gould, 5 *Hill*, 309. But see Smith *v.* Argall, 6 *Hill*, 479; 3 *Denio*, 435.

## ARTICLE IV.

### ALTERATION AND DISSOLUTION.

SECTION 1081. Partnership made general by omission to notify changes.
1082. Admission of new special partners to be notified.
1083. Purchases of interest of special partner may become a special partner.
1084. Dissolution of special partnership.

Partnership made general by omission to notify changes

§ 1081. The partnership becomes general, if within ten days after any partner withdraws from it or any new partner is received into it, or a change is made in the nature of its business, or in its name, a certificate of such fact, signed by one or more of the partners, is not filed with the clerk with whom the original certificate of the partnership was filed.

3 R. S. (5th ed.), 63, § 12, modified by omitting the clause concerning "alterations in the names of the general partners" and "in the capital or shares of the special partners." The capital of the special partners cannot be diminished, and it is not easy to see why any other changes need be made public.

Admission of new special partners to be notified.

§ 1082. New special partners may be admitted into the partnership upon a certificate, stating the names, residences, and contributions to the common stock, of each of such partners, signed by each of them, and by the general partners, verified according to § 1066, being acknowledged or proved, and filed, according to §§ 1064 and 1065, with the clerk with whom the original certificate of the partnership was filed.

3 R. S. (5th ed.), 63, slightly modified.

Purchaser of interest of special partner, &c. may become special partner.

§ 1083. A special partner, or his legal representatives, may sell his interest in the partnership, and the purchaser thereof may, with the consent of the other partners, become a special partner, without changing the nature of the partnership, upon filing a notice of such sale with the clerk with whom the original certificate of partnership was filed, within ten days after such sale.

3 R. S. (5th ed.), 63.

Dissolution of special partnership

§ 1084. A special partnership is subject to dissolution in the same manner as a general partnership,[1] except that no dissolution by the acts of the partners is complete, until a notice thereof has been filed and recorded in the office of the clerk with whom the original certificate was recorded, and published once in each week for four weeks, in a newspaper printed in each county where the partnership has a place of business, and in the state paper.[2]

[1] Ames v. Downing, 1 *Bradf.*, 321.
[2] 1 R. S., 767, § 24.

# TITLE XII.

## INSURANCE.

CHAPTER I. General principles of insurance.
II. Marine insurance.
III. Fire insurance.
IV. Life and health insurance.

## CHAPTER I.

### GENERAL PRINCIPLES OF INSURANCE.

[1] In this chapter are inserted some rules which have been judicially determined only in their application to particular species of insurance, but which are deemed applicable to all classes.

ARTICLE I. Nature of the contract.
II. Parties.
III. Insurable interest.
IV. Concealment and representation.
V. The policy.
VI. Warranties.
VII. Premiums.
VIII. Perils and their causes.
IX. Notice of loss.
X. Double insurance.
XI. Re-insurance.
XII. Various kinds of insurance.

## ARTICLE I.

### NATURE OF THE CONTRACT.

SECTION 1085. Insurance a contract of indemnity.
1086. Meaning of terms used.
1087. Agreement to insure.
1088. Modifications of the contract.

§ 1085. Insurance is a contract whereby one party, for a consideration, undertakes to in emnify the other against

Insurance a contract of indemnity.

loss, damage or liability, arising from an unknown or contingent event.[1]

[1] It may be doubted whether this definition is true as respects life insurance. In England, it is held that it is not a contract of indemnity. (Dalby v. India Life Assu-So., 15 *C. B.*, 365.) But a late decision in this state (Ruse v. Mut. Benefit Ins. Co., 23 *N. Y.*, 516,) seems to involve a conclusion sustaining the text.

**Meaning of terms used.**

§ 1086. The person indemnified is called the insured.

The events contemplated as the source of danger are called the perils or risks.

The person who undertakes to indemnify, is called the insurer.[1]

The sum agreed upon in consideration of the undertaking to indemnify, is called the premium.

The instrument in which the agreement is set forth, is called the policy.

[1] As underwriting is not in use in this country, we have used the term insurer in all cases, instead of underwriter.

**Agreement to insure.**

§ 1087. The acceptance of an application for insurance by the insurer constitutes a valid agreement to insure, except where the insurer is one required by law to contract in another form exclusively.

**Modifications of the contract.**

§ 1088. The provisions of this title in reference to concealment and representations, apply as well in case of a modification of the contract as to its original formation.

## ARTICLE II.

### PARTIES TO THE CONTRACT.

SECTION 1089. Who may insure.
1090. Who may be insured.
1091, 1092. Assignment to mortgagee.
1093. Agent may treat contract as his own.

**Who may insure.**

§ 1089. Any one who is capable of making a contract may be an insurer. But this section does not affect the restrictions imposed by special statutes upon foreign corporations, non-residents and others.

§ 1090. Any one who has an insurable interest, excepting only an alien enemy, may be insured. Who may be insured.

§ 1091. Where the owner of property mortgaged effects insurance in his own name, providing that the loss, if any, is payable to the mortgagee, or assigns a policy of insurance to the mortgagee with the assent of the insurer, the insurance is deemed to be upon the interest of the mortgagor. The mortgagee does not cease to be a party to the original contract, and any act of his which would otherwise render the policy void will have the same effect, although the property is in the hands of the mortgagee. Assignment to mortgagee of thing insured.

Grosvenor *v.* Atlantic Fire Ins. Co., 17 *N. Y.*, 391; Buffalo Steam Engine Works *v.* Sun Mutual Ins. Co., *id.*, 401; Bidwell *v.* Northwestern Ins. Co., 19 *id.*, 179.

§ 1092. If the insurer, at the time of his assent to the transfer of the policy, imposes further obligations on the assignee, making a new contract with him, the acts of the mortgagor cannot affect his rights. Id.

Ibid.

§ 1093. When one procures an insurance for another without the authority of the latter, the latter may ratify it, but at any time before such ratification, the former may treat the contract as if it were his own. Agent may treat contract as his own.

Stilwell *v.* Staples, 19 *N. Y.*, 134.

## ARTICLE III.

### INSURABLE INTEREST.

SECTION 1094. Insurable interest defined.
1095. Interest in things.
1096. Expectancies.
1097. Measure of interest.
1098. Insurance without interest, illegal.
1099. When interest must exist.

§ 1094. Every interest, in a thing movable or immovable, or in the obligation of a person, or any relation to, or liability in respect of, the same, such that a contemplated peril might directly damnify the insured, is an insurable interest. Insurable interest defined.

Interest in things.

§ 1095. An insurable interest in a thing may consist in:

1. An existing right of property;

2. An inchoate right founded on such existing right;

3. An expectancy coupled with such an existing right in that out of which the expectancy arises.

Mere expectancies.

§ 1096. A mere contingent or expected interest in any thing, not founded on any actual right or property in the thing, nor upon any valid contract for it, is not an insurable interest.

Stockdale *v.* Dunlop, 6 *M. & W.*, 224; Devaux *v.* Steele, 6 *Bing. N. C.*, 358; Lucena *v.* Crawford, 3 *B. & P.*, 94.

Measure of interest in property.

§ 1097. The measure of an insurable interest in property is the extent to which the insured might be damnified by loss or injury thereof.

Insurance without interest illegal.

§ 1098. The sole object of insurance is the indemnity of the insured, and if he has no insurable interest the contract is void.

1 R. S., 662, §§ 8–10; 1 Duer Ins., 94; Ruse *v.* Mut. Ben. Ins. Co., 23 *N. Y.*, 516.

When interest must exist.

§ 1099. The interest insured must exist at the time of the loss, but need not exist before.

2 *Taunt.*, 237; 8 *Miss.*, 515; 4 *id.*, 336, 337; 3 *Sumn.*, 142. Perhaps this ought to be qualified by excepting life insurance from the cases in which interest at the time of loss is necessary. (Compare Dalby *v.* India Life Ins. Co., 15 *Com. B.*, 365; with Ruse *v.* Mut. Ben. Ins. Co., 23 *N. Y.*, 516.)

## ARTICLE IV.

### CONCEALMENT AND REPRESENTATIONS.

SECTION 1100. What must be disclosed.
1101. Test of materiality.
1102. Nature of interest.
1103. Representations.
1104. Effect of concealment or misrepresentation.
1105. Fraudulent warranty.
1106. Matters of opinion.

**What must be disclosed**

§ 1100. Each party must communicate to the other, frankly, in good faith, all material facts within his knowledge, which the other has not the means of ascertaining.

Though a fuller disclosure is required in marine insurance (see chapter thereon, *infra*), it depends not on a difference of principle but of the extent to which the insurer may be deemed cognizant of the facts. *Ang. Ins.*, 234.

**Test of materiality.**

§ 1101. Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract or in making his inquiries.

2 Duer Ins., 382–403.

**Interest of insured.**

§ 1102. The nature or amount of the interest of the insurer need not be communicated unless in answer to inquiry, except in cases mentioned in section

Tyler *v.* Ætna Fire Ins. Co., 12 *Wend.*, 507; 16 *id.*, 385; 2 *Am. Lead. Cas.*, 457.

**Representations.**

§ 1103. Representations may be oral or written. They may be made at the same time as the policy or before it.

**Effect of concealment or misrepresentation.**

§ 1104. The falsity of a representation of that which is material, or the concealment of that which ought to have been communicated, avoids the policy.

**Fraudulent warranty.**

§ 1105. An intentional and fraudulent omission to communicate matters that prove or tend to prove the falsity of a warranty, avoids the policy.

2 Duer Ins., 435, 573.

Matters of opinion.

§ 1106. Neither party is bound to communicate, even upon inquiry, his own judgment upon the matters in question.

2 Duer Ins., 583.

## ARTICLE V.

### THE POLICY.

SECTION 1107. Requisites of the policy.
1108. Whose interest is covered.
1109. Insurance, by agent or trustee.
1110. Insurance, by part owner.
1111. General terms.
1112. Successive owners.
1113. Transfer of the thing.
1114. Qualified interests.
1115. Description of the thing.
1116. Open and valued policies.
1117. Open policy, what.
1118. Valued policy, what.
1119. Running policy, what.
1120. Delivery of policy.

Requisites of the policy.

§ 1107. The policy must specify:

1. The parties between whom the contract is made;
2. The rate of premium;
3. The subject insured;
4. The risks insured against;
5. The period during which the insurance is to continue.

In certain cases it must also specify the interest of the insured.

Whose interest is covered.

§ 1108. When the name of the person intended to be insured is specified in the policy, it can be applied only to his own proper interest.

Kemble *v.* Rhinelander, 3 *Johns. Cas.*, 134, and see 5 *Wend.*, 541; 2 *Johns. Cas.*, 329; 2 *Cai.*, 203; 11 *Johns.*, 302.

Insurance by agent or trustee.

§ 1109. When an insurance is made by an agent or trustee, the fact that his principal or beneficiary is the person really insured may be indicated by general words in the policy, but even such general words are not necessary if the agent or trustee is described as such in the policy.

§ 1110. To render an insurance effective by one partner[1] or part-owner,[2] applicable to the interest of his co-partners or of other part-owners, it is necessary that the terms of the policy should be such as are applicable to the joint or common interest. Insurance by part owner.

[1] Graves *v.* Merchants' Ins. Co., 2 *Cranch*, 440; Pearson *v.* Lord, 6 *Mass.*, 81; Turner *v.* Burrows, 5 *Wend.*, 541; 3 Kent Com., 258.

[2] Toomey *v.* Bedford Ins. Co., 8 *Metc.*, 348; Id. *v.* Warren Ins. Co., 1 *Metc.*, 16. But see Holmes *v.* U. Ins. Co., 2 *Johns. Cas.*, 329; and Lawrence *v.* Sevor, 2 *Caines*, 203.

§ 1111. When the description of the insured is so general that it may comprehend any person, or any class of persons, he only can claim the benefit of the policy who can show that it was intended to include him. General terms.

Newson *v.* Douglass, 7 *Harr. & Johns.*, 451; Seamans *v.* Loring, 1 *Mason*, 127.

§ 1112. The policy may be so framed that it will inure to the benefit of whomsoever, during the continuance of the risk, may become the owner of the interest insured. Successive owners.

§ 1113. A mere transfer of the thing insured does not, unless the policy so provides, transfer the policy, but suspends it until the same person becomes owner of both the policy and the thing insured. Transfer of the thing insured.

2 Pars. Mar. L., 42.

§ 1114. If the insured is not an owner of the thing insured, but possesses only a partial or qualified property therein, his interest must be stated in the policy in order to make the insurance valid. Qualified interest.

2 Duer Ins., 463.

§ 1115. The thing insured must be plainly described upon the face of the policy. And the contract of insurance embraces no other subject than that described. Description of the thing

Phillips on Ins., § 415; Cheriot *v.* Baker, 2 *Johns.*, 351.

§ 1116. Policies are either open or valued. Open and valued policies.

§ 1117. An open policy is one in which the value of the subject insured is not fixed by the policy, but is left to be ascertained in cass of loss. Open policy what.

3 Kent Com., 272.

Valued policy, what.

§ 1118. To constitute a valued policy the contract must express on its face the agreement that the thing insured shall be valued at a sum specifically mentioned.

Laurent v. Chatham Fire Ins. Co., 1 *Hall*, 41; 3 Kent, 272.

Running policy, what

§ 1119. A running policy is one which contemplates successive insurances, and provides that the policy may be from time to time defined, especially as to the subjects of insurance, by additional statements or indorsements.

Delivery of policy.

§ 1120. When a policy has in fact been executed, and notice of its execution has been given to the insured, its actual delivery is not essential to the completion of the contract.

23 *Wend.*, 18; 1 Duer Ins., 66, § 10.

## ARTICLE VI.

### WARRANTIES.

SECTION 1121. Express and implied.
1122. Past, present and future warranties.
1123. Warranty as to past or present.
1124. Warranty as to future.
1125. Performance excused.
1126, 1127. What acts avoid the policy.
1128. Breach without fraud.

Express and implied

§ 1121. Warranties are either express or implied. Every express warranty must be contained in the policy itself, and another instrument, whether upon the same paper or not, cannot be referred to as making a part of the policy for this purpose; but no peculiar form of words is necessary.

By the existing law, warranties may be gathered from other instruments referred to by the policy as forming a part of it. This change is recommended in pursuance of the suggestions in Chaffee v. Cattaraugus County Mutual Insurance Company, 18 *N. Y.*, 376.

Past, present and future warranties.

§ 1122. A warranty may relate to the past, the present, the future, or any or all of these.

See Ang. on Ins., 187–195.

§ 1123. A statement in the policy of a matter relating to the insurer, the thing insured, or the risk, as a matter of fact, is an express warranty thereof. **Warranty as to past or present.**

§ 1124. A statement in the policy which imports that it is intended to do or omit a thing which materially affects the risk, is a warranty that such act or omission shall take place. **Warranty as to the future.**

Murdock *v.* Chenango Mutual Ins. Co., 2 *N. Y.*, 210; Bilbrough *v.* Metropolis Ins. Co., 5 *Duer*, 587.

§ 1125. When, before the time arrives for performance of a warranty relating to the future, the loss happens, or performance is made illegal, the omission to fulfill the warranty for either of these reasons does not avoid the policy. **Performance excused.**

Arnould Ins., 584; 2 Pars. Mar. L., 108, and note.

§ 1126. The violation of any material warranty or other provision of the policy, on the part of either party, avoids the policy. **What acts avoid the policy**

§ 1127. The policy may declare that a violation of specified provisions thereof shall avoid the policy; otherwise a breach of any provision does not avoid the policy unless the provision is material. **Id.**

This and the preceding sections are intended to relax the strictness which now requires performance of immaterial conditions.

§ 1128. A breach of warranty without fraud, merely exonerates the insurers from the time that it occurs, or, where it is broken in its inception, prevents the policy from attaching to the risk. **Breach without fraud,**

2 Duer Ins., 435.

## ARTICLE VII.

### PREMIUMS.

SECTION 1129. When earned.
1130, 1131, 1132. Return of premium.
1133. Over-insurance.
1134. Contribution.

When premium is earned.

§ 1129. The owner of the interest insured becomes bound for payment of the premium as soon as the thing is exposed to the perils insured against.

Return of premium.

§ 1130. The insured is entitled to a return of premium paid, or a proportion thereof, if his interest or part of it in the whole subject is not exposed to the perils insured against.

Id.

§ 1131. He is also entitled to a return of the premium when the contract is void on account of the fraud or misrepresentation of the insurer, or on account of facts, of the existence of which the insured was ignorant without his fault; or, when by any default of the insured other than actual fraud, the insurer never incurred any liability under the policy.

Delavigne *v.* United Ins. Co., 1 *Johns. Cas.*, 310; Elbers *v.* United Ins. Co., 16 *Johns.*, 128.

Id.

§ 1132. If the peril has existed for any period, however short, there can be no return of premium.

Waters *v.* Allen, 5 *Hill*, 421.

Over-insurance by several insurers.

§ 1133. In case of over-insurance by several insurers, the insurer is entitled to a ratable return of the premium proportioned to the amount by which the aggregate sum insured in all the policies exceeds the insurable value of the property at risk.

Contribution.

§ 1134. When the over-insurance is effected by simultaneous policies, the insurers contribute to the premium to be returned in proportion to the amount insured by their respective policies. When it is effected by successive policies, those only contribute to a return of the premium

who are exonerated by prior insurances from the liability assumed by them, and in proportion as the sum for which the premium was paid exceeds the amount for which, on account of prior insurance, they could be made liable.

Arnould Ins., 1229; 2 Pars. Mar. Law, 191; Fisk *v.* Masterman, 8 *M. & W.*, 165.

## ARTICLE VIII.

### PERILS AND THEIR CAUSES.

SECTION 1135. Perils, remote and proximate.
1136. Excepted perils.
1137. Extrication from peril.
1138. Negligence and fraud.

Perils, remote and proximate.

§ 1135. Insurers are liable for a loss of which a peril insured against was the proximate cause;[1] although a peril not contemplated by the contract may have been a remote cause of the loss; but they are not liable for a loss of which the peril insured against was only a remote cause.[2]

Matthews *v.* Howard, 11 *N. Y.*, 1.

[2] This is doubtless the general principle. The difficulty of the subject arises in its application. Insurance against fire does not cover destruction by a shock of lightning (Babcock *v.* Montgomery Mut. Ins. Co., 4 *N. Y.*, 326, affg. 6 *Barb.*, 637; Kennistom *v.* M. County Mut. Ins. Co., 14 *N. H.*, 341); nor explosion of a steam boiler (Millandon *v.* New Orleans Ins. Co., 4 *Rob.*, 15); nor injury by overheating (Austin *v.* Drewe, 6 *Taunt.*, 436); nor injury by removal of goods under reasonable apprehension that the house would be set on fire by a neighboring conflagration. (Hillier *v.* Allegany Mut. Ins. Co., 3 *Barr* [*Penn.*], 470.) But it is held to cover injury to goods by water poured on in extinguishing a fire consuming the goods or the building containing them or in removing them from a burning building (Angell Ins., 164), and destruction of a vessel by explosion of gunpowder; for the explosion is caused by fire, (Grim *v.* Phœnix Ins. Co., 13 *Johns.*, 451.) So of fire produced by friction. (Angell Ins., 168.) So of destruction by blowing up to prevent the spread of a conflagration. (City Fire Ins. Co. *v.* Corlies, 21 *Wend.*, 367.)

Excepted perils.

§ 1136. Where a peril is excepted in the contract, a loss, of which such peril is the remote cause, is also thereby ex-

cepted; although the immediate cause of such loss was a peril which was not excepted.

St. John v. Am. Mut. Fire Ins. Co., 11 *N. Y.*, 516; 1 *Duer*, 371.

Loss incurred in extrication from peril.

§ 1137. The insurer is also liable for the loss where the thing insured is extricated from a peril contemplated by the policy that would otherwise have caused a loss, but by unanticipated means is taken from and never again restored to the possession of the insured, so that to him the loss is the same as if the peril had continued to operate.

Tilton v. Hamilton Fire Ins. Co., 1 *Bosw.*, 367.

Negligence and fraud.

§ 1138. If the peril is caused by gross negligence or fraud on the part of the insured himself, the insurers are exonerated; but they are not exonerated by his ordinary negligence, nor by fraud or any degree of negligence on the part of his agents or others.

Ang. Ins., 166–180

## ARTICLE IX.

### NOTICE OF LOSS.

SECTION 1139. Notice of loss, and preliminary proof.

Notice of loss, and preliminary proof.

§ 1139. In case of loss the insured or other person entitled to the benefit of the insurance[1] must without any unnecessary delay[2] give notice thereof to the insurers. If the policy prescribes the requisites of such notice, or that it shall be accompanied with preliminary proofs, such requirements must be substantially fulfilled unless waived[3] by the insurers.

[1] Cornell v. Le Roy, 9 *Wend.*, 163.

[2] Truman v. Western Fire Ins. Co., 12 *Wend.*, 452.

[3] O'Neil v. Buffalo Fire Ins. Co., 3 *N. Y.*, 122; Etna Fire Ins. Co. v. Tyler, 16 *Wend.*, 385.

## ARTICLE X.

### DOUBLE INSURANCE.

SECTION 1140. What it is.
1141. Contribution in case of double insurance.

§ 1140. A double insurance exists where the same person is insured by several insurers by separate policies or agreements, in respect to the same subject and interest. Double insurance.

See Mut. Fire Ins. Co. *v.* Hone, 2 *N. Y.*, 235.

§ 1141. In case of double insurance, unless the policies or agreements otherwise provides, the insured may claim payment of a loss from any one of the insurers, who on paying it may require the others to contribute thereto, ratably. Contribution in case of double insurance.

Gordon *v.* London Assur. Co., 1 *Burr.*, 492; Lucas *v.* Jefferson Ins. Co., 6 *Cow.*, 635; Ang. Ins., 22; 3 Kent Com., 280.

## ARTICLE XI.

### RE-INSURANCE.

SECTION 1142. Re-insurance defined.
1143. Disclosure required.
1144. Presumed to be against liability.
1145. Original insured has no interest.

§ 1142. A contract of re-insurance is that by which one who has become an insurer upon a certain risk procures a third person to insure him against loss or liability by reason of such original insurance. Re-insurance defined.

§ 1143. Where an insurer obtains re-insurance, he must communicate, not only all the representations of the original insured, but all the knowledge and information he possesses, whether previously or subsequently acquired, and which is material to the risk. Disclosure required.

2 Duer Ins., 429.

Re-insurance presumed to be against liability.

§ 1144. Unless it otherwise appears by the contract a re-insurance is a contract of indemnity against liability, and not merely against damage.

Ang. Ins., 138; Hastie v. De Peyster, 3 *Cai.*, 190.

Original insured has no interest.

§ 1145. The original insured has no interest in the contract of re-insurance.

Herckenrath v. Am. Ins. Co., 3 *Barb. Ch.*, 63; Carrington v. Com. Fire Ins. Co., 1 *Bosw.*, 152.

## ARTICLE XII.

### VARIOUS KINDS OF INSURANCE.

SECTION 1146. Usual kinds.
1147. Other kinds.

Usual kinds of insurance

§ 1146. The most usual kinds of insurance are,

Marine Insurance;

Fire Insurance;

Life and Health Insurance.

They are all subject to the provisions of this chapter, except so far as the rules specially applicable to each, hereinafter prescribed, otherwise provide.

Other kinds

§ 1147. Any other contingent or unknown event, which may damnify a person having an insurable interest, or create a liability against him, may be insured against, subject to the provisions of this chapter.

# CHAPTER I.

## MARINE INSURANCE.

NOTE.—Those rules respecting marine insurance which are but applications of the principles of international law to this subject are not embraced in these provisions, as they are not within the scope of a municipal statute.

ARTICLE I. Marine insurance defined.
II. Insurable interest.
III. Concealment.
IV. Representations.
V. Implied warranties.
VI. The voyage, and deviation.
VII. Loss.
VIII. Abandonment.
IX. Measure of interest.

## ARTICLE I.

### MARINE INSURANCE DEFINED.

SECTION 1148. Definition.

§ 1148. Marine insurance is an insurance against risks connected with navigation, to which a ship, cargo or freight, freight money, profits, or other insurable interest in movable property, may be exposed during a certain voyage or a fixed period of time.

Marine insurance defined.

3 Kent, 203. The term "freight" is used here, as in the title on Carriage, to signify the cargo or burden, and the term "freight money" to signify the payment for carriage.

## ARTICLE II.

### INSURABLE INTEREST.

SECTION 1149. Insurable interest in ship.
1150, 1151. In freight money.
1152. Freight money, what.
1153. Interest in profits.
1154. Interest of charterer.

Insurable interest in ship.

§ 1149. The owner of a ship has in all cases an insurable interest in it, even when he has chartered it to one who covenants to pay him her value in case of loss.

Hobbs *v.* Hannam, 3 *Camp.*, 93.

In freight money.

§ 1150. The owner of a ship has an inchoate interest in expected freight money, which he may insure when he would certainly have earned the same but for the intervention of the perils insured against.

23 *Pick.*, 409; 1 *Metc.*, 141; 3 *B. & P.*, 95.

Id.

§ 1151. This inchoate interest exists in the case of a charter-party, when the ship has broken ground on the chartered voyage;[1] and, when a price is to be paid for the carriage of goods, when they are actually on board, or there is some contract for putting them on board, and both ship and goods are ready for the specified voyage.[2]

[1] Gordon *v.* Com. Ins. Co., 4 *Denio*, 362; Thompson *v.* Taylor, 6 *Term*, 478; Horncastle *v.* Smart, 7 *East*, 400.
[2] Forbes *v.* Aspinall, 13 *East*, 331; Montgomery *v.* Effington, 3 *Term*, 362.

Meaning of freight money.

§ 1152. Freight money, in the sense of a policy of marine insurance, signifies all the benefit derived by the owner, either from chartering the ship or from employing it to the carriage of his own goods or those of others.

Insurable interest in profits.

§ 1153. One has an insurable interest in profits who has an interest in the subject from which the profits are expected to proceed.

Abbott *v.* Labor, 3 *Johns. Cas.*, 39.

§ 1154. The charterer of a ship has an insurable interest in it to the extent that he is liable to be damnified by its loss. Insurable interest of charterer.

Oliver *v.* Green, 3 *Mass.*, 133; 16 *id.*, 294; Bartlett *v.* Walker, 13 *Mass.*, 267.

## ARTICLE III.

### CONCEALMENT.

SECTION 1155. Information must be communicated.
1156. Information.
1157. Presumption of knowledge.
1158. Concealment.
1159. What need not be disclosed.
1160. Matters which each party is bound to know.
1161. Waiver.
1162. Concealments which are material only in case of loss.

§ 1155. In marine insurance each party is bound to communicate, in addition to what is required by section 1100, all information he possesses, material to the risk, except such as is mentioned in section 1159, and to state the exact and whole truth in relation to all matters that he represents, or upon inquiry discloses. Information must be communicated.

2 Duer Ins., 381, 388; Ang. Ins., 200.

1156. In marine insurance information of the belief or expectation of a third person, in reference to a material fact, is material. Information.

2 Duer Ins., 388.

§ 1157. The insured is presumed to have had knowledge, at the time of insuring, of a prior loss, if the information might possibly have reached him in the usual mode of transmission and at the usual rate of communication. Presumption of knowledge of loss.

This is the rule which prevails in continental Europe; and its adoption here is recommended by Mr. Duer. Vol. 2, p. 433.

§ 1158. A neglect to communicate that which is material is called a concealment. A concealment, wh ther intentional or not, entitles the injured party to avoid the policy. Concealment.

Matters which need not be communicated without inquiry.

§ 1159. Neither party is bound to communicate the following matters, except in answer to the inquiries of the other:

1. Those which the other knows;[1]

2. Those which in the exercise of ordinary care, the other ought to know, and of which the former has no reason to suppose he is ignorant;[2]

3. Those of which he waives communication;

4. Those which prove or tend to prove the existence of a risk which a warranty excludes, and that are not otherwise material;

5. Those which relate to a risk excepted from the policy, and that are not otherwise material.[3]

[1] This rule is usually stated with the addition that facts which the insurer may be presumed to know need not be communicated; but the true rule seems to be that though the insured trusts to his presumption that the insurer knows facts which he is not bound to know, he does so at his peril. In other words, the presumption is a mere rule of evidence; one method of showing that he had actual knowledge.

[2] Duer Ins., 563.

[3] Id., 573, 580.

Matters which each is bound to know.

§ 1160. Each party is bound to know all the general causes that are open to his inquiry, equally with that of the other, that may affect either the political or material perils contemplated; and all general usages of trade.

2 Duer Ins., 560.

Waiver of communications.

§ 1161. The right to a communication of material facts may be waived either by the terms of the policy, or by the neglect of the party to make inquiries as to such facts where they are distinctly implied in other facts communicated.

Id.

Concealments which only affect the risk in question.

§ 1162. The effect of a concealment in respect to any of the following matters is not to vitiate the entire contract, but merely to exonerate the insurer from a loss resulting from the risk concealed:

1. National character of the insured;

2. Liability of the thing insured to capture and detention;

3. Liability to seizure from breach of foreign laws of trade;

4. Want of necessary documents;
5. The use of false and simulated papers.

## ARTICLE IV.

### REPRESENTATIONS.

SECTION 1163. Interpretation.
1164. Representation as to future.
1165. How may affect policy.
1166. When may be withdrawn.
1167. Time referred to.
1168. Materiality.
1169. Representing information.
1170. Falsity.
1171, 1172. Effect of falsity.
1173. Representation of expectation.

How interpreted.

§ 1163. The words of a representation are to be understood in their plain and obvious meaning. If a representation is so ambiguous in its terms that it may be understood with equal propriety in two senses, and the person to whom it is made omits to seek an explanation, he is bound by it in the sense intended by the person who made it.

2 Duer Ins., 661.

Representation as to future.

§ 1164. A representation as to the future is to be deemed a promise, unless it appears that it was merely a statement of belief or expectation.

2 Duer Ins., 664.

How may affect policy.

§ 1165. A representation cannot be allowed to qualify an express provision in the policy; but it may qualify an implied warranty.

2 Duer Ins., 671.

When may be withdrawn.

§ 1166. A representation once made is binding; but it may be altered or withdrawn before the insurance is effected.

2 Duer Ins., 679.

Time intended by representation.

§ 1167. The completion of the policy is the time to which the representation is to be

2 Duer

Materiality.

§ 1168. The materiality of a representation is determined by the same rule as the materiality of a concealment.

Representing information.

§ 1169. When the insured has no personal knowledge of a fact, he may, if he believes the information to be true, repeat it, with the explanation that he does so on the information of others, or he may submit the information, in its whole extent, to the insurer. In the latter case he is not answerable for its truth, unless it proceeds from an agent of the insured whose duty it is to give the intelligence.

2 Duer Ins., 703.

Falsity.

§ 1170. A representation is to be deemed false when it fails to correspond with the facts that it affirms or stipulates. The falsity may be either intentional or accidental.

When the representation, whether affirmative or promissory, is made with an intent to deceive, the fraud, in all cases, vitiates the contract. When the falsity of the representation is accidental, if the representation is wholly false, or if it was partially false at the time when made, or at the commencement of the risks, the insurer is exonerated; but when the policy has attached, and the representation is falsified by a subsequent event, such accidental falsity does not render the policy void in its origin. 2 Duer Ins.

Effect of falsity.

§ 1171. If a representation is false in a material[1] point, whether affirmative[2] or promissory,[3] the policy is avoided thereby from the time of its falsity.

[1] A certain class of representations — *e. g.*, as to the inception of the risk — are held to be in effect warranties, and binding as much as if expressed in the policy. (2 Duer Ins., 686, 716.) There is, however, no apparent objection to requiring them to be inserted in the policy if the insurer desires to avail himself of a breach of such stipulation, notwithstanding that it may prove immaterial.

[2] 2 Duer Ins., 680.

[3] Bilbrough *v.* Metropolis Ins. Co., 5 *Duer*, 587.

Effect of intentional falsity.

§ 1172. If a representation is intentionally false in any point, whether material or not, the policy is wholly avoided thereby.

Park on Ins., 405; Skin., 327.

§ 1173. The eventual falsity of a representation as to expectation does not, in the absence of fraud, avoid the policy. Representation of expectation

## ARTICLE V.

### IMPLIED WARRANTIES.

SECTION 1174. Seaworthiness defined.
1175. Seaworthiness warranted.
1176. When to exist.
1177. What constitutes seaworthiness.
1178. Different degrees.
1179. Unseaworthiness.
1180. Seaworthiness as to cargo.
1181. When no such warranty exists.
1182. Neutral papers.

§ 1174. In every contract of marine insurance a warranty is implied, unless it is otherwise agreed, that the ship insured or by which freight insured is to be earned, or any other thing insured is to be carried, shall be seaworthy. Seaworthiness defined

Dixon *v.* Sadler, 5 *M. & W.*, 405.

§ 1175. Seaworthiness is the fitness of the ship to encounter the ordinary perils of the circumstances in which the policy contemplates its being placed. Seaworthiness impliedly warranted.

See M'Lanahan *v.* Universal Ins. Co., 1 *Pet.*, 170; compare Marcy *v.* Sun Mut. Ins. Co., 11 *Louis. Ann.*, 748.

§ 1176. The implied warranty of seaworthiness is complied with if the ship is seaworthy at the time of the commencement of the voyage, or, where the policy is intended to attach at a previous time, if it is seaworthy at that time. At what time seaworthiness must exist.

Id., and see 2 Pars. Mar. L., 134

§ 1177. The warranty of seaworthiness extends not only to the condition of the structure of the ship itself, but requires that it be properly laden,[1] and provided with a sufficient number of competent officers and seamen, and with the requisite appurtenances and equipments, such as ballast,[2] cables and anchors,[3] cordage and sails,[4] food, water, What things are required to constitute seaworthiness.

fuel and lights,[5] and other necessary and proper stores and implements, with reference to the voyage.

[1] Weir *v.* Aberdeen, 2 *B. & Ald.*, 320, and see Chase *v.* Eagle Ins. Co., 5 *Pick.*, 51; Walden *v.* N. Y. Fireman Ins. Co., 12 *Johns.*, 128; Draper *v.* Com. Ins. Co., 4 *Duer*, 234.

[2] Deblois *v.* Ocean Ins. Co., 16 *Pick.*, 303.

[3] Wilkie *v.* Geddes, 3 *Dow*, 57.

[4] Wedderburn *v.* Bell, 1 *Camp.*, 1.

[5] Fontaine *v.* Phœnix Ins. Co., 10 *Johns.*, 58; Moses *v.* Sun Mutual Ins. Co., 1 *Duer*, 159.

**Different degrees of seaworthiness at different stages of the voyage.**

§ 1178. Where different parts of the period or voyage contemplated by the policy differ in respect to the things requisite to make the ship seaworthy therefor, the warranty is complied with if at the commencement of each portion the ship is seaworthy with reference to that portion.

Dixon *v.* Sadler, 5 *M. & W.*, 414.

**Unseaworthiness during the voyage.**

§ 1179. When the ship is rendered unseaworthy during the voyage to which the insurance relates, an unreasonable delay in repairing the defect is a breach of the warranty which wholly suspends the liability of the insurers so long as such delay continues.

This section is proposed as being the doctrine best sustained by the somewhat conflicting cases. Compare 2 Pars. Mar. L., 140, and note. It may perhaps be deemed the more just rule that the insurer's liability should not be wholly suspended, but only suspended as to losses resulting from the breach. Id., 142.

**Seaworthiness for purposes of insurance on cargo.**

§ 1180. A ship which is seaworthy for the purposes of an insurance upon the ship, may nevertheless, by reason of being unfitted to receive the cargo, be unseaworthy for the purposes of insurance upon the cargo.

1 Phil. Ins., § 723. See also 2 Pars. Mar. L., 145.

**Time policy on ship at sea.**

§ 1181. In a time policy upon a ship which was at sea when the risk commenced, there is no implied warranty that the ship was then seaworthy. Such warranty can only be express.

This section is proposed to meet the difficulty apparent from the nature of the subject, and which has given rise to so many conflicting decisions. The ship is impliedly warranted as having been seaworthy at the

commencement of the voyage; and it seems a just rule to require any further warranty to be expressed. See many cases collected in 2 Pars. Mar. L., 148, note.

§ 1182. It is implied in a marine insurance that the ship shall have the requisite documents to show its neutrality in respect to belligerent powers. Neutral papers.

## ARTICLE VI.

### THE VOYAGE AND DEVIATION.

SECTION 1183, 1184. Voyage insured, how determined.
1185. Deviation, what.
1186. Excusable departure.
1187. Effect of deviation.

§ 1183. When the voyage contemplated by the policy is described by the places of beginning and ending, the voyage insured is the course of sailing fixed by mercantile usage between those places. Voyage insured, how determined

§ 1184. If the course of sailing is not fixed by any established usage, the voyage insured is the way between the specified places, which, to a master of ordinary skill and discretion, would seem the most natural, direct, and advantageous. Id.

Martin *v.* Del. Ins. Co., 2 *Wash. C. C.*, 254; Brown *v.* Tayleur, 4 *Ad. & Ell.*, 241; 2 Pars. Mar. Law., 281.

§ 1185. Deviation is any voluntary and unnecessary departure from the course or mode of performing the voyage insured, mentioned in the last two sections. Deviation, what.

§ 1186. A departure from the usual course or mode of performing the voyage insured, which is compelled by necessity, or is made for the purpose of saving human life, is not a deviation. Excusable departure.

See 3 Kent, 323, respecting *saving life*. As to avoiding a peril, see 2 Pars. Mar. L., 297, *et seq.*

§ 1187. The insurer is discharged from liability for any loss happening to the subject insured subsequently to deviation. Deviation excused

## ARTICLE VII.

### LOSS.

SECTION 1188. Total or partial.
1189. When total.
1190. When partial.
1191. Total loss actual or constructive.
1192. When presumed.
1193. When constructive.
1194. Breaking up of voyage.
1195. Cost of reshipment.
1196. Abandonment.
1197. When insured entitled to payment.
1198. Profits.
1199. Abandonment.
1200. Several subjects.
1201. Omission to abandon.

Total and partial losses.

§ 1188. A loss may be either total or partial.

What is a total loss.

§ 1189. A total loss within the meaning of the policy, may arise, either by a total destruction of the thing insured, or such an injury as leaves no part in its original state, or its loss by sinking, or by being broken in pieces, or so far damaged as to have become valueless to the owner for the purposes for which he held it.

See 2 Pars. Mar. L., 346; De Peyster *v.* Sun Mut. Ins. Co., 19 *N. Y.*, 272; Coit *v.* Smith, 3 *Johns. Cas.*, 16.

Partial loss.

§ 1190. Every loss which is not total is partial.

Bouvier's Law Dict., Loss.

Actual and constructive total loss.

§ 1191. A total loss may be either actual or constructive.

Presumed actual loss.

§ 1192. An actual loss may be presumed from the continued absence of the ship without being heard of. The length of time which is sufficient to raise this presumption depends on the circumstances of the case.

Gordon *v.* Bowne, 2 *Johns.*, 150; Marsh. Ins., 417.

Constructive.

§ 1193. Where the thing insured, though not actually destroyed or hopelessly lost, is so injured that it is worth less than half the market value thereof at the time of the loss, or that the performance of the contemplated voyage is prevented, the loss is a constructive total loss.

§ 1194. When the ship is prevented, at an intermediate port, from completing the voyage, the master must make every exertion to procure in the same or contiguous port, another ship, for the purpose of conveying the goods to their destination; and the liability of the insurer thereon, continues after they are thus reshipped.

Insurance on cargo, &c., when voyage is broken up.

Code de Com., 391, 392; Saltus *v.* Ocean Ins. Co., 12 *Johns.*, 107; Treadwell *v.* Union Ins. Co., 6 *Cow.*, 270; Whitney *v.* N. Y. Firemen's Ins. Co., 18 *Johns.*, 208.

§ 1195. The insurer is bound, besides, for damages, expense of discharging, storage, reshipment, surplus freight, and all other costs incurred in saving the goods, up to the amount insured.

Cost of reshipment, &c

Ibid., 393; Bridges *v.* Niagara Ins. Co., 1 *Hall*, 423.

§ 1196. If, within a reasonable time, the master cannot find a ship in which to send forward the goods, the insured may abandon.

Abandoning goods.

Ibid.

§ 1197. Upon an actual total loss the insured is entitled to payment without giving notice of abandonment.

When insured is entitled to payment.

Gordon *v.* Bowne, 2 *Johns.*, 150.

§ 1198. Where profits are insured, and the goods are not insured, the insurer is not liable for a loss unless the insured offers to abandon the goods.

Abandonment of goods on insurance of profits.

Tom *v.* Smith, 3 *Cai.*, 245.

§ 1199. Upon a constructive total loss the insured has a right to abandon the subject insured to the insurer, as prescribed in the next article, and to recover payment of the whole indemnity promised by the policy.

Abandonment.

§ 1200. If different things or class of things are insured by the same policy and separately valued, the right to abandon may exist in respect to a part as well as in respect to all.

Several subjects.

Deiderick *v.* Com. Ins. Co., 10 *Johns.*, 234.

§ 1201. If the insured omits to abandon, he may nevertheless recover his actual loss.

Omission to abandon.

Suydam *v.* Marine Ins. Co., 2 *Johns.*, 138; Earl *v.* Shaw, 1 *Johns. Cas.*, 313.

## ARTICLE VIII.

### ABANDONMENT.

SECTION 1202. Abandonment defined.
1203. Must be unqualified.
1204, 1205. When to be made.
1206. When defeated.
1207. How made.
1208. Requisites of notice.
1209. Cause not stated, unavailable.
1210. Effect.
1211. Waiver of formal abandonment.
1212. Agents.
1213. Acceptance.
1214. Abandonment irrevocable.
1215. Freight, how affected.
1216. Refusal to accept.

Abandonment defined.

§ 1202. Abandonment is the act by which, after a constructive total loss, the insured declares to the insurers that he relinquishes to them his interest in the thing insured.

Emerig., c. 27.

Must be unqualified.

§ 1203. An abandonment can neither be partial nor conditional.

Code de Com., art. 372; Arnould Ins., 1149; Suydam *v.* Marine Ins. Co., 1 *Johns.*, 181.

When may be made.

§ 1204. An abandonment cannot take place before the commencement,[1] nor after the known completion,[2] of the voyage.

[1] Code de Com., art. 370.
[2] Parage *v.* Dale, 3 *Johns. Cas.*, 156; Pezant *v.* National Ins. Co., 15 *Wend.*, 453.

Id

§ 1205. The abandonment must be made within a reasonable time after information of a loss; or the right to make it is waived.

Smith *v.* Steinbach, 2 *Cai. Cas.*, 158.

Abandonment may be defeated.

§ 1206. Where the information upon which an abandonment has been made proves incorrect, or the thing insured was so far restored at the time when the abandonment was

made, that there was in fact then no total loss, the abandonment becomes of no effect.

Church *v.* Bedient, 1 *Cai. Cas.*, 21; Hallett *v.* Peyton, *id.*, 28; Penny *v.* N. Y. Ins. Co., 3 *Cai.*, 155; Dickey *v.* Am. Ins. Co., 3 *Wend.*, 658. But as to the conflict in the cases on this question, see 2 Pars. Mar. L., 402, note.

How made.

§ 1207. Abandonment is made by giving notice thereof to the insurers; which may be done orally, or in writing.

2 Levi Com. L., 159; 2 Pars. Mar. L., 396. As to whether it ought not to be required to be in writing, see Parmeter *v.* Todhunter, 1 *Camp.*, 541.

Requisites of notice.

§ 1208. The notice must be explicit; and must specify the particular cause of the abandonment.

Suydam *v.* Marine Ins. Co., 1 *Johns.*, 181.

No other cause can be relied on.

§ 1209. An abandonment cannot be sustained upon a cause other than that specified in the notice.

*Id.*

Effect.

§ 1210. An abandonment is equivalent to a transfer, by the insured, of his interest, to the insurer, with all the chances of recovery and indemnity.

Rogers *v.* Hosack, 18 *Wend.*, 319; Radcliff *v.* Coster *Hoffm.*, 98; Atlantic Ins. Co. *v.* Storrow, 5 *Paige*, 285.

Waiver of formal abandonment.

§ 1211. If the insurer pays for a loss as if it were an actual total loss, he is entitled to whatever may remain of the thing insured or its proceeds or salvage, as if there had been a formal abandonment.

Arn. Ins., 1001; 2 Pars. Mar. L., 398.

Agents of the insurer become the agents of the insured.

§ 1212. Upon an abandonment the acts done in good faith, by those who were agents of the insured in respect to the thing insured, subsequent to the loss, are at the risk of the insurer and for his benefit.

Gardiner *v.* Smith, 1 *Johns. Cas.*, 141; Walden *v.* Phœnix Ins. Co., 5 *Johns.*, 310; Gardere *v.* Columbian Ins. Co., 7 *id.*, 514; Jumel *v.* Marine Ins. Co., 7 *id.*, 412

Acceptance.

§ 1213. Acceptance of the abandonment is not necessary to the rights of the insured, and is not to be presumed from the insurer's[1] silently receiving notice of abandonment.[2] But if there is an acceptance either express or im-

plied, it is conclusive on the parties, and admits the loss and the sufficiency of the abandonment.[2]

[1] 2 Pars. Mar. L., 399; Walden v. Phœnix Ins. Co., 5 *Johns.*, 310.
[2] Child v. Sun Mutual Ins. Co., 2 *Sandf.*, 76.
[3] Smith v. Robertson, 2 *Dowd.*, 474.

Accepted abandonment irrevocable.

§ 1214. An abandonment once made and accepted is irrevocable, unless the cause on which it was made proves to be unfounded.

2 Levi, Com. L., 166; 2 Pars. Mar. L., 413.

Freight how affected by abandonment of ship.

§ 1215. On an accepted abandonment of the ship, freight earned previous to the loss belongs to the insurer thereof; but freight subsequently earned belongs to the insurer of the ship.

United States Ins. Co. v. Lenox, 1 *Johns. Cas.*, 377; 2 *id.*, 443; 3 Kent Com., 333.

Refusal to accept.

§ 1216. If the insurer refuses to accept a valid abandonment he will be liable as upon an actual total loss, deducting from the amount any proceeds of the thing insured which may have come to the hands of the insured.

Church v. Bedient, 1 *Cai. Cas.*, 21.

## ARTICLE IX.

### MEASURE OF INDEMNITY.

SECTION 1217. Valuation, when conclusive.
1218. To what applicable.
1219. Apportionment.
1220. Valuation of profits.
1221. Open policy.
1222. Arrival of thing damaged.
1223. Labor and expense.
1224. General average.
1225. Contribution.
1226. One-third new for old.

Valuation, when conclusive.

§ 1217. The valuation in the policy is conclusive between the parties to the contract, if the insured has some interest at risk, and there is no fraud on his part. But a valuation fraudulent in fact, or so excessive as to raise a necessary presumption of fraud, avoids the policy and discharges the insurer.

3 Kent, 273, and cases cited.

§ 1218. The valuation in the policy is applicable in the adjustment as well of a partial as of a total loss. **Valuation applies to partial loss.**

3 Kent, 274.

§ 1219. In case of a valued policy on freight or cargo, if a part only of the subject is exposed, the valuation applies only in proportion to such part. **Valuation apportioned**

3 Kent, 275.

§ 1220. When profits are valued and insured, a loss of them is conclusively presumed from a loss of the goods out of which they were reputed to arise, and the valuation fixes their amount. **Valuation applied to profits.**

3 Peters, 222; 2 Pars. Mars. L., 70, n. 4; Abbott v. Sebor, 3 *Johns. Cas.*, 39.

§ 1221. In estimating a loss under an open policy, the following rules are to be observed: **Estimating loss under an open policy.**

1. The value of a ship is its value at the beginning of the risk, including all such articles or charges as add to its permanent value, or are necessary to prepare her for the voyage insured, including cost of insurance;

2 Pars. Mar. L., 70, and see 2 Arnould's Ins., 1339.

2. The value of cargo is the first cost, or where that cannot be ascertained, the market value,[1] at the time and place of lading, to which is to be added the usual charges incurred before the beginning of the risk,[2] including freight, storage and commissions, but without reference to the rate of exchange,[3] incurred in its purchase, or any drawback on the expectation or the fluctuations of the market at the port of destination, or expenses incurred on the arrival;[4]

[1] 3 Kent Com., 335, 336; Gahn v. Broome, 1 *Johns. Cas.*, 120; Suydam v. Marine Ins. Co., 1 *Johns.*, 181. But compare 2 Pars. Mar. L., 72.

[2] Fontaine v. Columbian Ins. Co., 9 *Johns.*, 29.

[3] Ogden v. Columbian Ins. Co., 10 *Johns.*, 273.

[4] Lawrence v. N. Y. Ins. Co., 3 *Johns. Cas.*, 217.

3. The value of freight money is the gross freight money insured, without reference to the cost of earning it,[1] but including the premium of insurance.

[1] Stevens v. Columbian Ins. Co., 3 *Cai.*, 43; Ogden v. Gen. Mut. Ins. Co., 2 *Duer*, 204.

Arrival of thing damaged.

§ 1222. If the thing insured arrives damaged at the port of destination, the measure of the insurer's liability is the difference between the market price of the thing so damaged, and the market price it would have borne if sound

3 Kent's Com., 336.

Labor and expenses.

§ 1223. The insurer is liable for all the labor and expense attendant upon a loss which forces the ship into port to be repaired; and where the policy provides that the insured shall labor for the recovery of the property the insurer is liable for the expenses incurred thereby in addition to a total loss.

3 Kent's Com., 339.

General average.

§ 1224. The insurer is liable for a loss falling upon the insured through a contribution in respect to the thing insured, required to be made by him towards a sacrifice called for by a peril contemplated by the policy.

Contribution.

§ 1225. Where the insured has a demand against others for contribution, he may claim the whole loss from the insurer, subrogating him to his own rights for contribution

Jumel v. Marine Ins. Co., 7 *Johns.*, 412; Magrath v. Church, 1 *Cai.*, 196.

One-third new for old.

§ 1226. In the case of a partial loss of a ship or its equipments, the old materials are to be applied toward payment for the new, and whether the ship is new or old the insurer is liable for only two-thirds of the remaining cost of the repairs.

Byrnes v. National Ins. Co., 1 *Cow.*, 265; 2 Pars. Mar. L., 437.

## CHAPTER III.

### FIRE INSURANCE.

Sections 1227. Representations.
1228. Alterations.
1229. Id.
1230. Acts of the insured.
1231. Effect of change of interest.
1232. Id.
1233. Id.
1234. Id.

False representation.

§ 1227. An insurance against fire is not affected by a concealment, nor by the falsity of a representation not inserted in the policy, even though in a material point, unless made with a fraudulent intent.

See Burritt *v.* Saratoga Mut. Fire Co., 5 *Hill*, 588.

Alterations of thing insured.

§ 1228. An alteration in the uses or condition of the thing insured from those to which it is limited by the policy, made without the consent of the insurer, by means within the control of the insured, and which increases the risk, avoids the policy.

Ang. Ins., 206.

Alteration.

§ 1229. An alteration which does not, in itself, or by the use of the means of alteration, increase the risk, does not affect the policy.

Ibid.

Acts of the insured.

§ 1230. Acts of the insured, subsequent to the execution of the policy, which do not violate its provisions, even though they increase the risk, do not affect the policy, unless they are the cause of a loss.

Stebbins *v.* Globe Ins. Co., 2 *Hall*, 632.

Effect of change of interest.

§ 1231. Except where it is otherwise provided, if, before a loss, any portion of the interest insured is devolved upon another person than the insured, and the insured does not, with the consent of the insurer, trans[illegible] or a proportionate intere[illegible]

the policy becomes void, except in the cases hereinafter mentioned.

Ang. Ins., 258–288.

Exception in the case of several subjects in one policy.

§ 1232. A change of the interest in one or more of several distinct things, separately insured by one policy, does not avoid the policy as to the others.

In the case of the death of the insurer.

§ 1233. A change of interest, by succession, upon the death of the insured, does not avoid the policy.

This is deemed a reasonable exception.

In the case of transfer between co-tenants.

§ 1234. A transfer of interest by one of several partners, joint-tenants or tenants-in-common, who are jointly insured, to the other, does not avoid the policy.

16 *Barb.*, 511; 23 *id.*, 623.

## CHAPTER IV.

### LIFE AND HEALTH INSURANCE.

SECTION 1235. When life insurance may be payable.
1236. Insurable interest.
1237. Assignment of policy.
1238. Notice of assignment.
1239. Measure of interest.

Insurance upon life, when payable.

§ 1235. An insurance upon life may be made payable upon the death of the person, or upon his surviving a specified period, or periodically so long as he shall live, or otherwise contingent upon the continuance or determination of life.

Insurable interest.

§ 1236. Every person has an insurable interest in the life and health

1. Of himself;

2. Of any person on whom he depends wholly or in part for education or support;

3. Of any person under a legal obligation to him for the payment of money, or respecting property or services, which death or illness might defeat or prevent performance

4. Of any person upon whose life any estate or interest, vested in him, depends.[1]

[1] A sister has an insurable interest in the life of her brother, who stands in place of a parent to her. Lord *v.* Dall, 12 *Mass.*, 115.

Assignee, &c., of life policy need have no interest.

§ 1237. A policy of insurance on life or health may pass by transfer, will or succession, to any person, whether he has an insurable interest or not, and such person may recover upon it whatever the original insured might have recovered.

St. John *v.* Amer. Mut. Life Ins. Co., 13 *N. Y.*, 31; 2 *Duer*, 419.

Notice of assignment

§ 1238. Unless otherwise provided in the policy, notice to the insurer of an assignment or bequest is not necessary to preserve the validity of the policy.

Ang. Ins., 413.

In what cases the sum fixed by the policy is conclusive.

§ 1239. Unless the interest of the insured is susceptible of exact pecuniary measurement, the measure of interest is the sum fixed in the policy.

Compare St. John *v.* Amer. Life Ins. Co., 2 *Duer*, 419; 13 *N. Y.*, 31; Mutual Life Ins. Co. *v.* Wager, 27 *Barb.*, 354; Miller *v.* Eagle Life & Health Ins. Co., 2 *E. D. Smith*, 268.

# TITLE XIII.

## COMMERCIAL PAPER.

CHAPTER I. Commercial paper in general.
II. Bills of exchange.
III. Promissory notes.
IV. Checks and drafts.
V. Bank notes and certificates of deposit.

## CHAPTER I.

### COMMERCIAL PAPER IN GENERAL.

ARTICLE I. What paper is negotiable.
II. Interpretation.
III. Transfer without indorsement.
IV. Indorsement.
V. Right to payment.
VI. Presentment for payment.
VII. Dishonor.
VIII. Excuse of presentment and notice.
IX. Exoneration of parties.

## ARTICLE I.

### WHAT PAPER IS NEGOTIABLE.

SECTION 1240. To what instruments this title is applicable.
1241. Negotiable instrument, what.
1242. What it may contain.
1243. What it need not contain.
1244. Date.
1245. Different classes of negotiable paper.

To what instruments this title is applicable.

§ 1240. The provisions of this title apply only to negotiable paper, as defined in § 1241.

Negotiable instrument, what.

§ 1241. A negotiable instrument is a writing,[1] with or without seal,[2] signed by the party to be charged thereby, or his agent for that purpose,[3] promising or requesting the payment of a specified sum[4] of money only,[5] without any

condition that is not absolutely certain of fulfillment,[6] to the bearer, or to the order of a specified person, described with such certainty that he can be ascertained at the time the instrument is made.[7]

[1] 1 R. S., 768.
[2] Overruling Clark *v.* Farmers' W. M. Co., 15 *Wend.*, 256. In accordance with Porter *v.* McCollum, 15 *Geo.*, 529.
[3] 1 R. S., 768.
[4] Story on Notes, § 20.
[5] Little *v.* Phœnix Bank, 7 *Hill*, 359; Atkinson *v.* Manks, 1 *Cow.*, 691.
[6] Sackett *v.* Palmer, 25 *Barb.*, 179; Cook *v.* Satterlee, 6 *Cow.*, 108.
[7] Yates *v.* Nash, 8 *C. B.* [*N. S.*], 586; Cowie *v.* Sterling, 6 *El. & Bl.*, 333; Douglass *v.* Wilkeson, 6 *Wend.*, 637.

**What it may contain**

§ 1242. A negotiable instrument may also contain a provision for its conversion into a contract of a different nature at the option of the holder,[1] and a pledge of collateral security, with authority to dispose thereof.[2] It cannot contain any other contracts than those mentioned in this section, and 1241,[3] but it may contain any matters not amounting to a contract, and not inconsistent with the provisions of § 1241.[4]

[1] Hodges *v.* Shuler, 22 *N. Y.*, 114.
[2] Arnold *v.* Rock River Co., 5 *Duer*, 207.
[3] See Austin *v.* Burns, 16 *Barb.*, 643.
[4] This allows instructions as to placing to account, advice, &c.

**What it need not contain.**

§ 1243. It is not necessary that the instrument should be dated,[1] nor that it shonld specify any time[2] or place of payment, though it may do so.[3]

[1] Mechanics' & F. Bank *v.* Schuyler, 7 *Cow.*, 337, *a.*
[2] Id.
[3] Story on Notes, § 49.

**Date.**

§ 1244. Any date may be inserted by the maker, whether past, present, or future, and the instrument is not invalidated by his death or incapacity at the time of the nominal date.[1]

[1] Story on Notes, § 48.

**Different classes of negotiable paper.**

§ 1245. There are six classes of negotiable paper, namely:

1. Bills of exchange;
2. Promissory notes;

3. Bank notes;
4. Checks;
5. Bonds;
6. Certificates of deposit.

## ARTICLE II.

### INTERPRETATION OF NEGOTIABLE PAPER.

SECTION 1246. Time and place of payment.
1247. Instruments payable to a person or his order, how construed.
1248. Fictitious payees.

Time and place of payment.

§ 1246. If the instrument does not specify the time of payment, it is payable immediately.[1] If it does not specify a place of payment, it is payable where it is dated, and if it has no date, it is payable wherever it is held at maturity.[2]

[1] Lake Ontario R. R. *v.* Mason, 16 *N. Y.*, 451; Cornell *v* Moulton, 3 *Den.*, 12; Peets *v.* Bratt, 6 *Barb.*, 662; Thompson *v.* Ketcham, 8 *Johns.*, 189; Jones *v.* Brown, 11 *Ohio* [*N. S.*], 601.

[2] See Haldane *v.* Johnson, 8 *Exch.*, 689.

Instruments payable on his own order, how construed.

§ 1247. An instrument payable to a person named, but adding the words, "or to his order," or "or to bearer," or words equivalent thereto, is in the former case payable to the order of such person, and in the latter case, payable to the bearer.

Fictitious payees.

§ 1248. If the payee named in the instrument is obviously fictitious, it is payable to the bearer.[1] If it is drawn to the order of the maker, or of a fictitious person, it has, if negotiated by the maker, the same effect against him and all persons having knowledge of the facts, as if payable to the bearer.[2]

[1] Willets *v.* Phœnix Bank, 2 *Duer*, 121.

[2] 1 R. S., 768.

## ARTICLE III.

### TRANSFER WITHOUT INDORSEMENT.

SECTION 1249. Negotiation, what.
1250. Warranty implied by negotiation.
1251. Further warranty.
1252. When transferee has the rights of indorsee.

Negotiation, what.

§ 1249. The transfer of a negotiable instrument for a valid consideration is called a negotiation thereof.

Warranty implied by negotiation

§ 1250. By the act of negotiation, the person negotiating warrants the instrument to be what it purports to be,[1] and to be binding according to its purport upon all the parties thereto;[2] and also warrants that he has no knowledge of any facts which tend to prove it worthless, such as the insolvency of any of the parties thereto, its payment, or its invalidity for any[3] cause.

[1] Gurney *v.* Womersley, 4 *Ell. & Bl.*, 133; Cabot Bank *v.* Morton, 4 *Gray*, 156; Herrick *v.* Whitney, 15 *Johns.*, 240; Gompertz *v.* Bartlett, 2 *Ell. & Bl.*, 849; Canal Bank *v.* Bank of Albany, 1 *Hill*, 287.

[2] Delaware Bank *v.* Jarvis, 20 *N. Y.*, 226; Furniss *v.* Ferguson, 15 *id.*, 437.

[3] Brown *v.* Montgomery, 20 *N. Y.*, 287.

Further warranty.

§ 1251. Unless the negotiation is in the nature of a sale, the person negotiating also warrants the principal debtor on the instrument to be at the time of the negotiation in such condition that it would be paid if then due and presented to him.[1]

[1] Ontario Bank *v.* Lightbody, 13 *Wend.*, 107 (Ct. of Errors,) decides this as to a payment; Timmins *v.* Gibbins, 18 *Q. B.*, 722, as to a deposit; and see ibid. as to changing a bill.

When transferee has the rights of indorsee.

§ 1252. The transferee of an instrument payable to the bearer, or indorsed generally, has the rights of an indorsee.

## ARTICLE IV.

### INDORSEMENT.

SECTION 1253. Indorsement, how made.
1254. General and special indorsements.
1255. General indorsement, how made special.
1256. Destruction of negotiability by indorser.
1257. Implied warranty of indorser.
1258. Indorser, when liable to payee.
1259. Indorsement without recourse.
1260. Indorser's sureties.
1261. Title acquired by indorsee.
1262. Apparent maturity of bill payable after sight.
1263. Apparent maturity of bill payable at sight.
1264. Apparent maturity of note or bond.
1265. Liability of party to an instrument in blank.
1266. Void instruments, when made valid.

Indorsement, how made.

§ 1253. Any person may indorse the instrument by writing his name thereon, and delivering it to another person. If there is not room for a signature on the instrument itself, the indorsement may be written on a separate paper annexed thereto.[1]

[1] Story on Notes, § 121.

General and special indorsements.

§ 1254. An indorsement may be general or special. A general indorsement is one by which no indorsee is named. A special indorsement specifies the indorsee.

General indorsement, how made special.

§ 1255. An instrument bearing a general indorsement cannot be afterwards specially indorsed. But any lawful holder may turn a general indorsement into a special one, by writing the name of an indorsee above it.

Destruction of negotiability by indorser.

§ 1256. A special indorsement may be so made as to render the instrument not negotiable, but nothing short of express words for that purpose can have that effect.[1]

[1] Leavitt *v.* Putnam, 3 *N. Y.*, 494; Story on Notes, § 139.

Implied warranty of indorser.

§ 1257. Every indorser warrants to every subsequent holder of the instrument, who is not liable thereon to him:

1. That it is in all respects what it purports to be;[1]
2. That he has a good title to it;[2]
3. That his indorsement is binding upon him;[3]
4. That the signatures of all prior parties are binding upon them;[4]

5. That if upon its maturity, it is duly presented to the principal debtor, and not paid, the indorser will, upon notice thereof being duly given to him,[5] pay so much of the same as the holder paid therefor, with interest.[6]

[1] McGregor *v.* Rhodes, 6 *El. & Bl.*, 266.
[2] Story on Notes, § 135.
[3] Id.
[4] Erwin *v.* Downs, 15 *N. Y.*, 575.
[5] Story on Notes, § 135.
[6] Cook *v.* Clark, 4 *E. D. Smith*, 213; Cram *v.* Hendricks, 7 *Wend.*, 569, 642; Braman *v.* Hess, 13 *Johns.*, 52; see Ingalls *v.* Lee, 9 *Barb.*, 651.

Indorser when liable to payee.

§ 1258. One who indorses the instrument before it is delivered to the payee, is liable thereon to the payee.

This is the common sense of the decision in Moore *v.* Cross, 19 *N. Y.*, 227. But previous cases have so complicated the question that it is necessary to clear up the confusion by a positive rule. It has long been maintained that an indorser, before delivery to the payee, does not mean to be responsible to him, and though this doctrine is now overruled, yet the decision is put upon grounds that are needlessly technical.

Indorsement without recourse.

§ 1259. Any indorser may qualify his indorsement with the words, "without recourse," or equivalent words; and, upon such indorsement, he is responsible only to the same extent as in the case of a transfer without indorsement.[1] In other respects, such an indorsement has the same effect as any other.

[1] Story on Notes, § 146.

Indorser's sureties.

§ 1260. All indorsers are sureties, and have the rights of such,[1] except as herein otherwise provided. Successive indorsers are not co-sureties.[1]

[1] See the title on SURETYSHIP.
[2] Ailsen *v.* Barkley, 2 *Speers*, 747.

Title acquired by indorsee.

§ 1261. Indorsement vests in the indorsee all the real title of the indorser; and if the indorsee acquires the instrument in good faith[1] and for a valuable consideration, before its apparent maturity,[2] and before it has been dishonored within his knowledge,[3] it vests in him all the apparent title of the person transferring it to him. Valuable consideration and good faith are defined in Part V. of the Fourth Division of this Code. An indorsee, acquiring an instrument in

the manner described in this section, is called an indorsee in due course.

[1] See note to § 1299.

[2] This phrase is adopted to avoid circumlocution.

[3] Anderson v. Busteed, 5 *Duer*, 485.

Apparent maturity of bill, &c., payable after sight.

§ 1262. The apparent maturity of a bill of exchange or draft, payable at a specified time after sight, and not accepted, is after its date.

It is very desirable that the term at the end of which a bill may be presumed to be dishonored should be fixed. The decisions are conflicting and unsatisfactory. We have not at present undertaken to fill the blanks in this section and the two following ones.

Apparent maturity of bill, &c., payable at sight.

§ 1263. The apparent maturity of a bill of exchange, check or draft, payable at sight or on demand, is,

1. If it bears interest, after its date;
2. If it does not, after its date.

Apparent maturity of note or bond.

§ 1264. The apparent maturity of a promissory note or bond, payable on demand or at sight, is,

1. If it bears interest,[1]
2. If it does not,[2]

If payable at a certain time after demand or sight, such time is to be added to the periods herein mentioned.

[1] It is doubtful whether a demand note bearing interest has any "apparent maturity," unless it is known to be dishonored. See Merritt v. Todd, 23 *N. Y.*, 28; Brooks v. Mitchell, 9 *M. & W.*, 15; Wethey v. Andrews, 3 *Hill*, 582. See Sice v. Cunningham, 1 *Cow.*, 397; Losee v. Dunkin, 7 *Johns.*, 70; on the affirmative side: but the former is overruled in Merritt v. Todd.

[2] Loomis v. Pulver, 9 *Johns.*, 244; Furman v. Haskin, 2 *Cai.*, 369; Carlton v. Bailey, 7 *Foster*, 230.

Liability of party to an instrument in blank.

§ 1265. A party to a negotiable instrument, of which any part is left blank, is liable thereon to an indorsee in due course in whatever manner such blank may be filled before its transfer to him.[1]

[1] Van Duzer v. Howe, 21 *N. Y.*, 531; Schultz v. Astley, 2 *Scott*, 815; 2 *Bing. N. C.*, 544.

Void instruments when made valid.

§ 1266. A negotiable instrument made void by statute, or otherwise, is valid in the hands of an indorsee, in due course.[1]

[1] A similar rule has been established in England, by statute. The common law interpretation of statutes declaring instruments void, is of course different.

## ARTICLE V.

### RIGHT TO PAYMENT.

SECTION 1267. Instrument or security may be required on payment.
1268. Wilful destruction of instrument destroys right to payment.

Instrument or security may be required on payment.

§ 1267. No party to a negotiable instrument can be required to pay it, unless it is given up to him, or unless security is given to him, with two sufficient sureties, to indemnify him against any lawful claim thereon,[1] or unless it is clearly proved to have been destroyed.[2]

[1] 1 R. S., 406; Story on Notes, § 106.
[2] Des Arts *v.* Leggett, 16 *N. Y.*, 582.

Wilful destruction of instrument destroys right to payment.

§ 1268. No person is entitled to payment of a negotiable instrument if he, or any one under whom he claims, has wilfully destroyed it.[1]

[1] Blade *v.* Noland, 12 *Wend.*, 173.

## ARTICLE VI.

### PRESENTMENT FOR PAYMENT.

SECTION 1269. Demand not necessary. Effect of want of demand.
1270. Due presentment, what.
1271. Proper presentee.
1272. Proper time.
1273. Proper place.
1274. Day of maturity, when.
1275. Holidays.
1276. Holidays, as to particular presentees.
1277. Holidays, as to particular presentors.
1278. Secular days.

Demand not necessary. Effect of want of demand.

§ 1269. It is not necessary to make any demand for payment upon the principal debtor in order to charge him; but if the instrument is by its terms payable at a specified place, he is, if ready and willing to pay it at maturity at such place, relieved from the payment of subsequent interest, and may tender the amount due in any action brought against him thereon, with like effect as in other cases of tender.

Fairchild *v.* Ogdensburgh R. R. Co., 15 *N. Y.*, 337; Wolcott *v.* Van Santvoord, 17 *Johns.*, 248.

Due presentment, what.

§ 1270. Due presentment for payment is a presentment of the instrument and a demand of payment made by the holder to the proper person at the proper time and place.

Proper presentee.

§ 1271. The principal debtor is the person to whom the presentment ought to be made. But if he cannot, with reasonable diligence, be found at the proper time and place, his agent for that purpose is the proper person.

Proper time

§ 1272. The proper time is the day of maturity, within reasonable hours. If the instrument is payable at a particular house, the proper time is within such hours as are usually kept in similar houses.

Proper place.

§ 1273. If the instrument is payable at a particular house, that is the proper place. If it is payable within a particular town or district, the debtor's place of business or residence, if within the same, or if not, then any place within the same, is proper. In other cases, any place in which the debtor is found, or where he resides or transacts his business, is proper.

Day of maturity, when.

§ 1274. The day of maturity of the instrument is the day on which by its terms it becomes due, with the addition of such days of grace as are allowed by law. In cases in which no grace is allowed, if the instrument becomes due, by its terms, on a holiday, it is not mature until the next business day.[1]

[1] Salter *v.* Burt, 20 *Wend.*, 205; see Campbell *v.* International Assurance Company, 4 *Bosw.*, 298.

Holidays.

§ 1275. Holidays, within the meaning of this title, are, every Sunday, the first day of January, the twenty second day of February, the fourth day of July, the twenty-fifth day of December, any day on which an election is held throughout the State, and any day appointed by the President of the United States, or the Governor of this State, for a public fast or thanksgiving. If the first of January, the twenty-second of February, the fourth of July, or the twenty-fifth of December, falls upon a Sunday, the Monday following is a holiday.[1] All others are business days.

[1] Laws of 1860.

§ 1276. If the instrument declares the principal debtor to be of a particular religious persuasion, any day regarded as sacred by all persons of that persuasion, and generally known to be so regarded, must be treated as a holiday, so far as such instrument is concerned.

Holidays as to particular presentees.

Modified from the existing law, by requiring the instrument to state the debtor's religion, as a condition of allowing him this privilege.

§ 1277. Any person whose duty it is to present an instrument for acceptance or payment, or to give notice of its dishonor, may, for the purposes of such presentment or notice, treat any day, regarded as sacred by all persons of his religious persuasion, as a holiday.[1]

Holidays as to particular presentors.

[1] Story on Bills, § 293.

## ARTICLE VII.

### DISHONOR OF NEGOTIABLE PAPER.

SECTION 1278. Dishonor, what.
1279. Notice of dishonor, by whom given.
1280. Form of notice.
1281. Notice, how served.
1282. Personal service.
1283. Service by substitution.
1284. Service by mail.
1285. Notice, how served after indorser's death.
1286. Notice, when to be given.
1287. Notice, how given by agent.
1288. Additional time for notice by indorser.
1289. Notice by one, notice by all.
1290. Knowledge, when sufficient notice.

§ 1278. A negotiable instrument is dishonored when duly presented for payment, or for acceptance where acceptance may be required, and not paid, or not accepted.

Dishonor what.

Story on Bills, § 228.

§ 1279. Notice of dishonor can only be given after actual dishonor, by the owner of the instrument,[1] or the person having it in his possession,[2] or a party thereto who has

Notice of dishonor, by whom given.

been charged with such notice,[3] or has waived it, or the agent of any of them.[4]

[1] Chanoine *v.* Fowler, 3 *Wend.*, 173; Story on Notes, § 301.
[2] Ogden *v.* Dobbin, 2 *Hall*, 112; Bank of U. S. *v.* Davis, 2 *Hill*, 451.
[3] Baker *v.* Morris, 25 *Barb.*, 138; Stafford *v.* Yates, 18 *Johns.*, 327.
[4] Cole *v.* Jessup, 10 *N. Y.*, 96; 10 *How.*, 515.

Form of notice.

§ 1280. The notice must be in writing,[1] but may be in any form which describes the instrument with reasonable certainty,[2] and substantially informs the party receiving it that the instrument has been presented for payment, or for acceptance, and has not been paid,[3] or has not been accepted, [and that the party giving the notice looks to him for payment.[4]]

[1] New. [2] Hodges *v.* Shuler, 22 *N. Y.*, 114.
[3] Youngs *v.* Lee, 12 *N. Y.*, 551; Cook *v.* Litchfield, 9 *N. Y.*, 279; Solarte *v.* Palmer, 1 *Bing. N. C.*, 194.
[4] This clause has been held unnecessary. Bank of U. S *v.* Carneal, 2 *Peters*, 553. But see the previous cases.

Notice, how served.

§ 1281. The notice may be served personally or by substitution, or by mail.

Laws 1857, ch. 416.

Personal service.

§ 1282. Personal service is made by delivering the notice to the indorser in person.[1]

[1] Such service is good wherever made. Hyslop *v.* Jones, 3 *McLean*, 96.

Service by substitution.

§ 1283. Service by substitution is made by delivering the notice to some person of discretion in his family or service, at his place of business or residence.[1]

[1] Story on Notes, § 312; slightly more stringent in this section, service by mail being always allowed.

Service by mail.

§ 1284. Service by mail is made by properly folding the notice, directing it to the person to be charged, at his place of residence, according to the best information that the holder can obtain, putting it into the post office most conveniently accessible from the place where the presentment was made, and paying the postage thereon.[1]

[1] Laws 1857, ch. 416, § 3.

Notice how served after indorser's death.

§ 1285. If the indorser is dead, the notice must be given to one of his personal representatives; or if there are none,

then to any member of his family who resided with him at his death; or if there is none, then it must be mailed to his last address.[1] But notice sent to the indorser in good faith, in ignorance of his death, though after it has happened, is valid.

[1] Modified from Story on Notes, § 310. Story says that notice should be left at the domicile of the deceased. This would often fail to reach his representatives,—more often than under the rule given above.

Notice, when to be given.

§ 1286. Notice of dishonor, when given by the holder or his agent, must be given on the day of dishonor, or on the next business day thereafter, or if, on the latter day, no mail leaves the place where the presentment is made for the place where the indorser resides or has a place of business, notice must be given by the first mail so leaving thereafter.[1]

[1] Cuyler *v.* Stevens, 4 *Wend.*, 566.
[2] Story on Notes, §§ 325, 327.

Notice, how given by agent.

§ 1287. When the holder of the instrument, at the time of its dishonor, is a mere agent for the owner, it is sufficient for him to give notice to his principal in the same manner as to an indorser, and such principal may give notice to the indorser as if he were himself an indorser.[1] And if an agent of the owner employs a sub-agent, it is sufficient for each successive agent to give due notice to his own principal.

[1] Story on Notes, § 326; Howard *v.* Ives, 1 *Hill*, 263; Ogden *v.* Dobbin, 2 *Hall*, 112.

Additional time for notice by indorser.

§ 1288. An indorser receiving notice of dishonor, has the like time thereafter to give similar notice to prior parties as the original holder had.[1] But this additional time is available to him only.[2]

[1] Story on Notes, § 331.
[2] Rowe *v.* Tipper, 13 *C B.*, 249.

Notice by one, notice by all.

§ 1289. Notice given by one of the parties to the instrument, enures to the benefit of all.[1]

[1] Chapman *v.* Keane, 3 *Ad. & Ell.*, 193; Lysaght *v.* Bryant, 9 *C. B.*, 46.

Knowledge, when sufficient notice

§ 1290. If the indorser is the person to whom the instrument is properly presented for payment at maturity, his knowledge of its dishonor is sufficient notice thereof to him.

Caunt *v.* Thompson, 7 *C. B.*, 400.

## ARTICLE VIII.

### EXCUSE OF PRESENTMENT AND NOTICE.

SECTION 1291. Presentment, when excused.
1292. Notice, when excused.
1293. Presentment and notice, when excused.
1294. The like.
1295. Delay, when excused.
1296. Waiver of presentment and notice.

Presentment, when excused.

§ 1291. Presentment is not necessary:

1. When the place of payment is not designated in the instrument, and the place of residence or business of the principal debtor cannot, with reasonable diligence, be ascertained by the holder;

2. When no person to whom presentment can properly be made can, with reasonable diligence, be found by the holder;

3. When the instrument purports to be signed by the principal debtor within this state, and he resided therein at the time of signing, but has removed therefrom.

Foster *v.* Julien, 24 *N. Y.*, 28.
See Spies *v.* Gilmore, 1 *id.*, 321.

Notice, when excused.

§ 1292. Notice of dishonor is not necessary, when, with like diligence, the place of residence or business of the indorser cannot be ascertained, or there is no post office communication therewith.

Presentment and notice, when excused.

§ 1293. If the holder is informed by an indorser, within ten days[1] before the maturity of the instrument, that it will be dishonored, presentment and notice are excused as to such indorser.[2]

[1] No term is at present fixed by the law, but if the rule is to be maintained at all, it should be made clear and certain.

[2] Spencer *v.* Harvey, 17 *Wend.*, 489; Leffingwell *v.* White, 1 *Johns. Cas.*, 99.

The like.

§ 1294. If, before or at the maturity of the instrument, the indorser has received full security for the amount thereof, or the maker has assigned all his estate to him as such security, presentment and notice are excused as to him.[1]

[1] Mechanics' Bank *v.* Griswold, 7 *Wend.*, 165; Corney *v.* Da Costa, 1 *Esp.*, 302; limited in Seacord *v.* Miller, 13 *N. Y.*, 55.

This rule is founded upon the same principle as the series of cases that were overthrown in Hall *v.* Newcomb, 7 *Hill*, 416, and perhaps ought to share their fate. If the maker intends that the indorser shall waive notice, he would naturally so stipulate with him, or would give the security to the holder outright. The following is suggested instead of this section:

[§ 1294. No transactions between the maker and indorser waive or excuse notice of dishonor to the latter, unless they so agree.]

Delay, when excused.

§ 1295. Delay in presentment or in giving notice of dishonor, is excused, when caused by inevitable accident.[1]

[1] Perhaps the phrase "circumstances over which the party has no control" would be more correct. The rule at present is liberal. (Story on Bills, § 234; Story on Notes, § 356.) Other excuses are mentioned (id., § 357), but it is very doubtful whether they are allowed in New York.

Waiver of present-ment and notice.

§ 1296. Presentment and notice may be waived by any one entitled to the same. Such waiver must be made in writing, if made before dishonor.[1] A waiver of presentment is a waiver of notice also, unless the contrary is expressly agreed; but a waiver of notice does not waive presentment.[2] A waiver of protest on any instrument other than a foreign bill of exchange, waives presentment and notice.[3]

[1] New.

[2] Buchanan *v.* Marshall, 22 *Vt.*, 561; Burnham *v.* Webster, 17 *Me.*, 50.

[3] Coddington *v.* Davis, 1 *N. Y.*, 186; 3 *Den.*, 16.

## ARTICLE IX.

### EXONERATION OF PARTIES TO NEGOTIABLE PAPER.

SECTION 1297. Principal debtor, how exonerated.
1298. Other parties, how exonerated.
1299. Exoneration by payment.
1300. Revival of liability.
1301. Exoneration by want of notice.

Principal debtor, how exonerated.

§ 1297. The principal debtor is exonerated by an agreement to that effect with the owner of the instrument, when made upon sufficient consideration, or when such debtor has been induced by such agreement to do or omit some act, by doing or omitting which he is prejudiced.[1]

[1] Story on Bills, § 266.

Other parties, how exonerated.

§ 1298. Other parties to negotiable paper are exonerated in the same manner as the principal debtor, and also in like manner with other sureties.

Exoneration by payment.

§ 1299. A party to a negotiable instrument payable to the bearer, or indorsed generally,[1] is exonerated, except as prescribed in section 1300, by payment thereof to any actual holder, unless such payment is made in bad faith[2] or through gross negligence,[3] in which cases he remains liable to the owner of the instrument.

[1] Story on Notes, § 383.

[2] All the cases.

[3] Pringle *v.* Phillips, 5 *Sandf.*, 157; Merriam *v.* Granite Bank, 8 *Gray*, 254; Gill *v.* Cubitt, 3 *B. & C.*, 466; Down *v.* Halling, 4 *id.*, 330. But this rule is now completely repudiated in England, and positive *bad faith* is alone recognized as defeating title. Raphael *v.* Bank of England, 17 *C. B.*, 161; Goodman *v.* Harvey, 4 *Ad. & El.*, 870; Foster *v.* Pearson, 1 *C., M. & R.*, 849; Crook *v.* Jadis, 5 *B. & Ad.*, 909; Uther *v.* Rich, 2 *Per. & Dav.*, 579; Bank of Bengal *v.* Fagan, 7 *Moore P. C.*, 72; Carlon *v.* Ireland, 5 *E. & B.*, 771.

Revival of liability.

§ 1300. He remains liable, notwithstanding such payment, to any subsequent indorsee for value in due course.

See Manhattan Co. *v.* Reynolds, 2 *Hill*, 140.

§ 1301. An indorser is exonerated from liability if notice of dishonor is not given to him as prescribed in this chapter, and is not excused or waived. Exoneration by want of notice.

## CHAPTER II.

### BILLS OF EXCHANGE.

ARTICLE I. Form and interpretation.
II. Days of grace.
III. Presentment for acceptance.
IV. Acceptance.
V. Acceptance or payment for honor.
VI. Presentment for payment.
VII. Excuse of presentment.
VIII. Rules peculiar to foreign bills.

## ARTICLE I.

### FORM AND INTERPRETATION OF A BILL.

SECTION 1302. Bill of exchange, what.
1303. Drawee, in case of need.
1304. Bill in parts of a set.
1305. Bill, where payable.
1306. Implied warranty of drawer and indorser.
1307. Rights of drawer.

§ 1302. A bill of exchange is a negotiable instrument, by which one who is called the drawer requests another,[1] called the drawee, to pay to the order of a specified person, called the payee, or to the bearer, a specified sum of money. Bill of exchange, what.

[1] Peto *v.* Reynolds, 9 *Exch.*, 410; Davis *v.* Clarke, 6 *Q. B.*, 16. But see Wheeler *v.* Webster, 1 *E. D. Smith*, 1. See Fairchild *v.* Ogdensburgh R. R., 15 *N. Y.*, 337.

§ 1303. The bill may also give the names of others than the drawee, to be resorted to in case of need. Drawee in case of need

§ 1304. The bill may be drawn in any number of parts, each part stating the existence of the others. An agreement to draw a bill binds the drawer to execute it in three parts, if the other party to the agreement desires the same.[1] Presentment or acceptance of a single part in a set, is sufficient for the whole. Bill in parts of a set.

[1] Story on Bills, § 66.

Bill, where payable.

§ 1305. The bill is payable

1. At the place where, by its terms, it is made payable; or,

2. If it specifies no place of payment, at the place to which it is addressed; or,

3. If it is not addressed to any place, wherever the drawee may be found, or at his residence, or place of business.[1]

[1] See Story on Bills, § 48.

Implied warranty of drawer and indorser.

§ 1306. The drawer and each indorser warrant to every subsequent holder of the bill:

1. That the drawee is competent to bind himself by his acceptance;[1]

2. That he will, upon due presentment of the bill for that purpose, duly accept the same;[2]

3. That he will, upon due presentment thereof for that purpose, pay the same;

4. That if any one of these conditions is not fulfilled, such drawer or indorser will himself, upon due notice of dishonor being given to him, pay the bill, with the lawful damages thereon.

[1] Story on Bills, §§ 107, 230.
[2] Walker *v.* Bank of N. Y., 9 *N. Y.*, 582.

Rights of drawer.

§ 1307. The drawer has all the rights of an indorser, as defined in chapter I. of this title.

## ARTICLE II.

### DAYS OF GRACE.

SECTION 1308. Days of grace, what.

Days of grace, what.

§ 1308. The three days following the day on which bills of exchange payable otherwise than at sight or on demand, become due by their terms, are allowed as days of grace, unless the last of such days is a holiday, in which case the next preceding business day is the last day of grace allowed.

## ARTICLE III.

### PRESENTMENT FOR ACCEPTANCE.

SECTION 1309. When bill may be presented
1310. Due presentment, how made.
1311. Presentment to joint drawees.
1312. When presentment to be made to drawee in case of need.
1313. Presentment, when must be made.

§ 1309. At any time before the bill is payable, the holder may present it to the drawee for acceptance. **When bill may be presented.**

Story on Bills, § 228.

§ 1310. Due presentment for acceptance is made by the holder or his agent, on a business day: **Due presentment, how made.**

1. By presenting the bill to the drawee, or his agent for the purpose, if either can with reasonable diligence be found within the state to which the bill is addressed; and leaving the same with him if desired, until the same hour of the next business day;[1] or,

2. If this cannot be done, by presenting the bill at the place of business or residence of the drawee, within reasonable hours, to any person in the same, or to the nearest person if such place is closed, and demanding acceptance.[2]

[1] 1 R. S., 768; Story on Bills, § 237.
[2] Bank of Syracuse *v.* Hollister, 17 *N. Y.*, 46.

§ 1311. Presentment for acceptance to one of several joint drawees, and refusal by him, dispense with presentment to the others.[1] **Presentment to joint drawees.**

[1] This question has been considered very doubtful (Story on Bills, § 229), but is decided in effect by the case of Carman *v.* Pultz (21 *N. Y.*, 531).

§ 1312. If the bill specifies a drawee in case of need, it must be presented to him for acceptance or payment, as the case may be, before it can be treated as dishonored. **When presentment to be made to drawee in case of need.**

§ 1313. If the bill is payable at a specified time after sight, the drawer and indorsers are exonerated if it is not presented for acceptance within [ten] days after the time **Presentment, when must be made.**

required for its transmission with ordinary diligence, unless presentment is excused.

At present the only rule established is that "due diligence" must be used (Wethey *v.* Andrews, 3 *Hill*, 582; Smith *v.* Janes, 20 *Wend.*, 192; Robinson *v.* Ames, 20 *Johns.*, 146). But this is too indefinite.

## ARTICLE IV.

### ACCEPTANCE.

SECTION 1314. Acceptance, how made.
1315. Due acceptance, how made.
1316. Acceptance in other manner, when sufficient.
1317. Promise to accept, when equivalent to acceptance.
1318. Cancellation of acceptance.
1319. What is admitted by acceptance.

Acceptance, how made.

§ 1314. No acceptance of a bill is valid unless made in writing, and signed by the acceptor or his agent for that purpose.[1]

[1] 1 R. S., 768.

Due acceptance, how made.

§ 1315. Due acceptance, within the meaning of section 1306, is made by the drawee:

1. By signing his name[1] upon the face[2] of the bill[1] without any qualification of his contract, except that he may make it payable at any place within the town or city in which it is payable,[3] even though it is by its terms payable at another place in such town;[4] unless it is directed to be paid at that place only.

2. By refusing to return the bill to the holder after due presentment,[1] in which case it is payable immediately, without regard to its terms.[2]

[1] 1 R. S., 768.
[2] New.
[3] Troy City Bk. *v.* Lauman, 19 *N. Y.*, 477.
[4] See *id.*, 480. This seems to be reasonable.

Acceptance in other manner, when sufficient.

§ 1316. An acceptance in writing in any other manner is sufficient, if consented to by the holder of the bill. An acceptance by a separate instrument binds the acceptor to no person except one to whom it has been shown, and who, on the faith thereof, has given value for the bill.[1]

[1] 1 R. S., 768. Is not this rule too strict?

§ 1317. An unconditional promise in writing to accept a bill,[1] is a sufficient acceptance thereof, in favor of every person who, upon the faith thereof, has received the bill for value.[2]

Promise to accept, when equivalent to acceptance.

[1] The words "before it is drawn" omitted.
[2] 1 R. S., 768.

§ 1318. The acceptor may cancel his written acceptance at any time before delivering the bill to the holder,[1] and before the holder has, with the consent of the acceptor, transferred his title to another person for value, who has taken it upon the faith of such acceptance.[2]

Cancellation of acceptance.

[1] Cox *v.* Troy, 5 *B. & Ald.*, 474.
[2] Story on Bills, § 252.

§ 1319. Every acceptance admits the capacity of the drawer to draw and indorse the bill.[1] If written upon the bill, it also admits the signature of the drawer to be genuine, and binding upon him.[2] It does not admit the signature of any indorser[3] nor the body of the bill[4] to be genuine.

What is admitted by acceptance.

[1] Smith *v.* Marsack, 6 *C. B.*, 486.
[2] Sanderson *v.* Collmann, 4 *M. & G.*, 209.
[3] Smith *v.* Chester, 1 *T. R.*, 654.
[4] Bank of Commerce *v.* Union Bank, 3 *N. Y.*, 230. But ought this rule to stand?

## ARTICLE V.

### ACCEPTANCE OR PAYMENT FOR HONOR.

SECTION 1320. When bill may be accepted or paid for honor.
1321. Acceptance for honor, how made.
1322. How enforced.
1323. Notice of dishonor not excused by such acceptance.

§ 1320. On the bill being dishonored by the drawee, and, if it is a foreign bill, duly protested, it may be accepted or paid, for the honor of any party thereto, by any person.[1] The holder may refuse to receive the acceptance of such person, but may not refuse to receive full payment from him.[2]

When bill may be accepted or paid for honor.

[1] Story on Bills, § 121.
[2] Id., § 122.

Acceptance for honor, how made.

§ 1321. The acceptor or payer for honor must write an acceptance upon the bill, stating therein for whose honor he accepts or pays,[1] and must give notice to such parties, with reasonable diligence, of the fact of such acceptance or payment.[2] Having done so, he is entitled to reïmbursement from such parties, and from all parties prior to them.[3]

[1] Story on Bills, § 256. [2] Id., § 259. [3] Id., § 124.

How enforced.

§ 1322. If the bill has been accepted for honor, it must be presented at its maturity to the drawee for payment, and notice of its dishonor by him given to the acceptor for honor in like manner as to an indorser; upon which, such acceptor must pay the bill.[1]

[1] Story on Bills, § 123.

Notice of dishonor, not excused by acceptance of honor.

§ 1323. An acceptance for honor does not excuse the holder from giving notice of the dishonor of the bill by the drawee.[1]

[1] Story on Bills, § 255.

## ARTICLE VI.

### PRESENTMENT FOR PAYMENT.

SECTION 1324. Presentment, when bill not accepted, where made.
1325. Effect of delay in presentment in certain cases.
1326. Effect, in other cases.

Presentment, when bill not accepted, where made

§ 1324. If a bill is by its terms payable in a particular place, and is not accepted on presentment, it must be presented for payment, when such presentment is necessary, at the place at which by its terms it is payable.[1]

[1] This is the English law, 2 & 3 *W.*, 4, c. 98. But see Mitchell *v.* Baring, 10 *B.* & *C.*, 4.

Effect of delay in presentment in certain cases.

§ 1325. If a bill payable on demand, or at sight, without interest, is not duly presented for payment, unless such presentment is excused, within [ten] days after the time in which it could, with reasonable diligence, be transmitted to the proper place for such presentment, the drawer and indorsers are exonerated.

See § 1313.

Effect, in other cases.

§ 1326. Mere delay in presenting a bill payable with interest on demand, or at sight, does not exonerate any party thereto.[1]

[1] Merritt *v.* Todd, 23 *N. Y.*, 28.

## ARTICLE VII.

### EXCUSE OF PRESENTMENT AND NOTICE.

SECTION 1327. Presentment, when excused.
1328. Delay, when excused.
1329. Presentment and notice, when excused.

§ 1327. Presentment for acceptance is excused: Presentment, when excused.

1. If the holder of the bill cannot, with reasonable diligence, find any person authorized to accept it;

2. If the drawer has not capacity to accept it.

§ 1328. Delay in presentment for acceptance is excused when caused by inevitable accident. Delay, when excused.

§ 1329. Presentment for acceptance or payment, and notice thereof, are excused as to the drawer if he forbids the drawee to accept, or the acceptor to pay the bill;[1] or if, at the time of drawing, he had no reason to believe that the drawee would accept or pay the same.[2] Presentment and notice, when excused.

[1] Purchase *v.* Mattison, 6 *Duer*, 587; Jacks *v.* Darrin, 3 *E. D. Smith*, 557.

[2] Coyle *v.* Smith, 1 *E. D. Smith*, 400; Franklin *v.* Vanderpool, 1 *Hall*, 78.

## ARTICLE VIII.

### RULES PECULIAR TO FOREIGN BILLS.

SECTION 1330. Definitions.
1331. Protest necessary.
1332. Protest, by whom made.
1333. Protest, how made.
1334. Protest, where made.
1335. Protest, when to be made.
1336. Protest, when excused.
1337. Notice of protest, how given.
1338. Waiver of protest.
1339. Declaration before payment for honor.
1340. Damages allowed on dishonor.
1341. Rate of damages.
1342, 1343. Damages, how estimated.

§ 1330. An inland bill is one drawn and payable within this state. All other bills are foreign. Definitions.

Protest necessary.

§ 1331. Notice of the dishonor of a foreign bill can be given only by notice of its protest.

Protest, by whom made

§ 1332. Protest must be made by a notary public, if with reasonable diligence one can be obtained;[1] and if not, then by any reputable person in the presence of two witnesses.[2]

[1] Story on Bills, § 276. [2] Ibid.

Protest, how made.

§ 1333. It must be made by an instrument in writing, giving a literal copy of the bill of exchange, with all that is written thereon; stating the presentment, and the manner in which it was made; the presence or absence of the drawee or acceptor, as the case may be; the refusal to accept, or to pay, or the inability of the drawee to give a binding acceptance; and in case of refusal, the reason assigned, if any; and finally protesting against all the parties to be charged.[1]

[1] Story on Bills, § 276; Code de Commerce, arts. 173, 174.

Protest, where made

§ 1334. A protest for non-acceptance must be made in the city or town in which the bill is presented for acceptance; and a protest for non-payment in the city or town in which it is presented for payment.[1]

[1] Story on Bills, § 282.

Protest, when to be made.

§ 1335. The protest must be noted on the day of presentment, or the next business day;[1] but it may be written out at any time thereafter.[2]

[1] Story on Bills, § 283.
[2] Geralopulo *v.* Wieler, 10 *C. B.*, 690.

Protest, when exercised.

§ 1336. The want of protest, or delay in making the same, is excused in like manner with the want or delay of presentment.[1]

[1] Story on Bills, § 280.

Notice of protest, how given.

§ 1337. Notice of protest is given in the same manner as notice of dishonor. It may be given by the notary who makes the protest.

Waiver of protest.

§ 1338. If a foreign bill on its face waives protest, notice of dishonor may be given to any party thereto, in like manner as upon an inland bill. But if any indorser of a bill containing such a waiver, expressly requires protest to

be made by a written direction on the bill at or before his indorsement, protest must be made, and notice thereof given to him and to all subsequent indorsers.

Declaration before payment for honor.

§ 1339. The payer of a foreign bill for honor must declare, before payment, in the presence of a person authorized to make protest, for whose honor he pays the same, in order to entitle him to reimbursement.[1]

[1] Vandewall *v.* Tyrrell, as cited and explained in Geralopulo *v.* Wieler, 10 *C. B.*, 690.

Damages allowed on dishonor of foreign bill.

§ 1340. Damages are allowed as hereinafter prescribed, as a full compensation for interest, re-exchange, expenses, and all other damages, in favor of holders for value only, upon bills of exchange drawn or negotiated within this state, and protested for non-acceptance or non-payment.

Rate of damages.

§ 1341. The rate of damages allowed is, on bills drawn upon any person in

1. Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New Jersey, Pennsylvania, Ohio, Delaware, Maryland, Virginia, or the District of Columbia, three per centum on the principal sum;

2. North Carolina, South Carolina, Georgia, Kentucky, or Tennessee, five per centum thereon;

3. Any other part of North or South America,[1] or the islands in the Atlantic ocean, or Europe, ten per centum thereon;[2]

4. Any other place, twenty per centum thereon.[3]

[1] "North of the equator" omitted.

[2] 1 R. S., 770. This scale of damages needs revision. There is no sense in giving Georgia a preference to Indiana, or in putting Russia on the same footing with Montreal or Detroit.

[3] This is the custom of merchants.

Id.

[§ 1341. Damages are allowed upon bills drawn upon any person in

1. Any part of the United States except this state, lying north of Virginia and Kentucky, and east of Illinois and Wisconsin, at the rate of three per centum on the principal sum;

2. Any other part of the United States east of the Rocky Mountains, the two Canadas, and British provinces eastward thereof, at the rate of five per centum thereon;

3. Any other part of the United States, at the rate of seven per centum thereon;

4. Any other part of the continent of America, Europe, or islands in the Atlantic ocean, at the rate of ten per centum thereon;

5. Any other place, at the rate of twenty per centum thereon.[1]

[1] This is proposed as a substitute for the preceding section.]

Damages, how estimated.

§ 1342. If the amount of a protested bill is expressed in money of the United States, damages are estimated upon such amount without regard to the rate of exchange.[1]

[1] 1 R. S., 771.

Id.

§ 1343. In other cases, damages are estimated upon the value of a similar bill at the time of protest, in the place nearest to the place where the bill was negotiated, and where such bills are currently sold.

## CHAPTER III.

### OF PROMISSORY NOTES.

SECTION 1344. Promissory note, what.
1345. Bill of exchange, when converted into a note.
1346. Certain sections applicable.
1347. Effect of delay in presentment.

Promissory note, what.

§ 1344. A promissory note is an instrument, negotiable in form, whereby the signer promises to pay to a specified person or his order or to the order of a specified person, or to the bearer, a specified sum of money.

Bill of exchange, when connected with a note.

§ 1345. A bill of exchange, if accepted by a person other than the drawee, or acceptor for honor, with the consent of the owner, becomes in effect the promissory note of such person, and all prior parties thereto are exonerated.[1]

[1] See Peto *v.* Reynolds, 9 *Exch.*, 410.

Certain sections applicable to note.

§ 1346. Chapter I of this title, and sections 1308 and 1326 of this Code, apply to promissory notes.

§ 1347. If a note payable on demand, or at sight, without interest, is not duly presented for payment (unless such presentment is excused), within from its date, the indorsers thereof are exonerated.[1]

Effect of delay in presentment.

[1] Sice *v.* Cunningham, 1 *Cow.*, 397. But whether this rule ought to be maintained, *query?* See Brooks *v.* Mitchell, 9 *M. & W.*, 15; Merritt *v.* Todd, 23 *N. Y.*, 28.

## CHAPTER IV.

### CHECKS AND DRAFTS.

SECTION 1348. Checks and drafts, what.
1349. Rules applicable to them.

§ 1348. A check is a bill of exchange drawn upon a bank or banker, or a person described as such upon the face thereof, and payable on demand. A draft is a similar instrument, except that it is payable at or after sight, or at a future day.

Checks and drafts, what

§ 1349. Checks and drafts are subject to all the provisions of this Code concerning bills of exchange,[1] except that

Rules applicable to checks and drafts.

1. No days of grace are allowed thereon;[2]

2. The drawer is exonerated by delay in presentment only to such extent as he is injured thereby;[3]

3. The indorsee, after apparent maturity, acquires as good title as an indorsee before such period.[4]

[1] A check is an inland bill of exchange. Chapman *v.* White, 6 *N. Y.*, 412; Keene *v.* Beard, 8 *C. B.* (*N. S.*), 372; Eyre *v.* Waller, 5 *H. & N.*, 460.

It is *not* essential (as unnecessarily said in Harker *v.* Anderson, 21 *Wend.*, 372; Woodruff *v.* Merchants' Bank, 25 *Wend.*, 673;) that it should be payable to *bearer*. Eyre *v.* Waller, 5 *H. & N.*, 463.

[2] Laws 1857, ch. 416.

[3] Robinson *v.* Hawksworth, 9 *Q. B.*, 52; Harbeck *v.* Craft, 4 *Duer*, 122; see Little *v.* Phœnix Bank, 2 *Hill*, 425. Per BYLES, J., Keene *v.* Beard, 8 *C. B.* (*N. S.*), 381.

[4] Rothschild *v.* Corney, 9 *B. & C.*, 388. See Anderson *v.* Busteed, 5 *Duer*, 485.

## CHAPTER V.

### BANK NOTES AND CERTIFICATES OF DEPOSIT.

SECTION 1350. Bank notes negotiable after payment.
1351. Title acquired by indorsee.

Bank notes negotiable after payment.

§ 1350. Bank notes remain negotiable, even after they have been paid by the maker.

Title acquired by indorsee.

§ 1351. The indorsee of a bank note or certificate of deposit after its apparent maturity or actual dishonor within his knowledge, acquires as good a title as an indorsee before such event.

# TITLE XIV.

### INDEMNITY.

SECTION 1352. Indemnity defined.
1353. Indemnity for a future wrongful act, void.
1354. Indemnity for a past wrongful act, valid.
1355. Agreement for indemnity applied to consequences.
1356. Person indemnifying liable jointly or severally with person indemnified.
1357. Rules for interpreting agreement of indemnity.
1358. When person indemnifying, what is a surety.
1359. Recognizance, bail.

Indemnity defined.

§ 1352. Indemnity is a contract by which one party engages to save the other from some legal consequence of the conduct of either party, or of some other person.

Indemnity for a future wrongful act, void.

§ 1353. An agreement to indemnify a person for an act thereafter to be done is void, if the act is then known by such person to be wrongful.

Stone *v* Hooker, 9 *Cow.*, 154; Allaire *v.* Onland, 2 *Johns. Cas.*, 52; Coventry *v.* Barton, 17 *Johns.*, 142.

Indemnity for a past wrongful act, valid.

§ 1354. An agreement to indemnify a person for an act already done is valid, although the act was known to be wrongful.

Kneeland *v.* Rogers, 2 *Hall*, 579; Parker *v.* Rochester, 4 *Johns. Cas.*, 329.

§ 1355. An agreement to indemnify applies to the acts and their consequences not only of the persons indemnified, but of their agents, and an indemnity to several applies to each unless the contrary intention appears.

Agreement of indemnity applies to consequences.

Stone *v.* Hooker, 9 *Cow.*, 154; Hill *v.* Packard, 5 Wend., 375; affirming 2 S. C., 7 *Cow.*, 434.

§ 1356. One who indemnifies another against an act to be done is liable jointly with the person indemnified, or separately, to the person wronged by such act.

Person indemnifying liable jointly or severally with person indemnified

Herring *v.* Hoppock, 15 *N. Y.*, 409; affirming S. C., 12 *N. Y. Leg. Obs.*, 167; Fonda *v.* Van Horne, 15 *Wend.*, 631; Davis *v* Newkirk, 5 *Denio*, 92.

§ 1357. In the interpretation of contracts of indemnity, the following rules are to be applied unless a contrary intention appears:

Rules for interpreting agreements of indemnity.

1. Upon an indemnity against liability or in other equivalent terms, the person indemnified is entitled to recover upon showing that he has become liable;[1]

2. Upon an indemnity against claims, or demands, or damages or costs, or in other equivalent terms, the person indemnified is not entitled to recover without showing that he has paid such claims or expenses;[2]

3. An indemnity against claims, or demands, or liability, or in other equivalent terms embraces costs of defending against such claims;[3]

4. The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to matters embraced by the indemnity,[4] but the person indemnified has the right to conduct such defenses, if he elects so to do;[5]

5. If upon request, the person indemnifying refuses to defend the person indemnified, a recovery against the latter suffered by him in good faith, is conclusive in his favor against the former;[6]

6. If the person indemnifying, whether he is a principal or merely a surety in the agreement, has not reasonable notice of the action or proceedings against the person indemnified; and does not interfere in [illegible] it

against the latter is only presumptive evidence against the former, unless the contrary intention appears by the agreement.[7]

[1] Scott *v.* Tyler, 14 *Barb.*, 202; Chace *v.* Hinman, 8 *Wend.*, 452; Weble *v.* Pond, 19 *id.*, 423; Churchill *v.* Hunt, 3 *Den.*, 321; Gilbert *v.* Wiman, 1 *N. Y.*, 350, and see Westervelt *v.* Smith, 2 *Duer*, 449; S. C., 12 *N. Y. Leg. Obs.*, 78.

[2] Aberdeen *v.* Blackman, 6 *Hill*, 324; Scott *v.* Tyler, 14 *Barb.*, 202; Campbell *v.* Jones, 4 *Wend.*, 306; Churchill *v.* Hunt, 3 *Den.*, 321; Gilbert *v.* Wiman, 1 *N. Y.*, 550.

[3] Mott *v.* Hicks, 1 *Cow.*, 513.

[4] Trustees of Newburgh *v.* Gallatian, 4 *Cow.*, 340.

[5] See Peck *v.* Acker, 20 *Wend.*, 605, where this principle was applied to the case of sheriffs.

[6] Aberdeen *v.* Blackman, 6 *Hill*, 324; Beers *v.* Pinney, 13 *Wend.*, 308; Trustees of Newburgh *v.* Gallatian, 4 *Cow.*, 340; Given *v.* Driggs, 1 *Cai.*, 450; Stone *v.* Hooker, 9 *Cow.*, 154; Lee *v.* Clark, 1 *Hill*, 56; Holmes *v.* Weed, 19 *Barb.*, 128.

[7] Aberdeen *v.* Blackman, 6 *Hill*, 324; Riley *v.* Seymour, 1 *Wend.*, 143; Thomas *v.* Hubbell, 15 *N. Y.*, 405.

An indemnity against all actions, or in other equivalent terms, embraces groundless actions. Trustees of Newburgh *v.* Gallatian, 4 *Cow.*, 340.

An indemnity against all claims or demands, or in other equivalent terms, does not embrace groundless demands. Luddington *v.* Pulver, 16 *Wend.*, 404.

When person indemnifying what is a surety.

§ 1358. Where one person at the request of another, engages to answer in damages, whether liquidated or unliquidated, for any violation of duty on the part of the latter, he is entitled to be reimbursed in the same manner as a surety for what he may pay.

Recognizance, bail.

§ 1359. Upon those contracts of indemnity which are taken in legal proceedings, as security for the performance of an obligation imposed or declared by the tribunals, and known as undertakings or recognizances, the sureties are called bail.

Their obligations are governed by the statutes specially applicable thereto.

# TITLE XV.

## SURETYSHIP.

CHAPTER I. General Principles of Suretyship.
II. Guaranty.
III. Letter of Credit.

## CHAPTER I.

### GENERAL PRINCIPLES OF SURETYSHIP.

ARTICLE I. Who are sureties.
II. The liability of a surety.
III. The rights of a surety.

### ARTICLE I.

#### WHO ARE SURETIES.

SECTION 1360. Definition.
1361. Apparent principal.

§ 1360. A surety is one who becomes liable for the performance by another person of the obligation of such other person, or who assumes an obligation for the benefit of another person and at his request. **Definition.**

§ 1361. One who appears to be a principal may show that he is in fact a surety, except as against persons who have acted on the faith of his apparent character of principal. **Apparent principal.**

Mohawk and Hudson River R. R. Co. *v.* Costigan, 2 *Sandf. Ch.*, 306; Artcher *v.* Douglass, 5 *Denio*, 509.

## ARTICLE II.

### THE LIABILITY OF A SURETY.

SECTION 1362. Limit of surety's obligations.
1363. Obligation of the surety cannot exceed that of the principal.
1364. Surety not liable on an illegal principal contract.
1365. Surety discharged by certain acts of the creditor.
1366. What dealings with the debtor discharge the surety.
1367. Delay of creditor does not discharge a surety.
1368. A surety indemnified by the debtor is not exonerated.
1369. Judgment against surety makes him liable as principal.
1370. Exonerated by offer of satisfaction.
1371. Surety not discharged by act of law discharging principal.

Limit of surety's obligation.

§ 1362. A surety cannot be held beyond the scope of his contract;[1] but, in interpreting the language of the contract, the same rules are to be observed as in the case of other contracts.[2]

[1] Ludlow *v.* Simond, 2 *Cai. Cas.*, 1; Walsh *v.* Bailie, 10 *Johns.*, 180; Penoyer *v.* Watson, 16 *id.*, 100.

[2] Gates *v.* McKee, 13 *N. Y.*, 232.

Obligation of the surety cannot exceed that of the principal.

§ 1363. The obligation of the surety must be neither larger in amount nor in other respects more burdensome than that of the principal; and if, in its terms, it exceeds it, it is reducible in proportion to the principal obligation.

Code Nap., art. 2013.

Surety not liable on an illegal principal contract.

§ 1364. The surety is not liable if the contract of the principal is illegal; but he is liable notwithstanding any mere personal disability of the principal, though such disability be such as to make the contract void as against the principal.

Kimball *v.* Newell, 7 *Hill*, 116; Swift *v.* Beers, 3 *Denio*, 70.

Surety discharged by certain acts of the creditor.

§ 1365. The surety is discharged if the creditor does any act which would naturally prove injurious to the remedies of the surety or inconsistent with his rights, or if he omits to do anything, when required by the surety, which it is his duty to do, and the omission proves injurious to the surety.

Schroeppell *v.* Shaw, 3 *N. Y.*, 446, aff'g S. C., 5 *Barb.*, 580.

What dealings with the debtor

§ 1366. Where the surety's character appears on the face of his contract, or where the creditor has actual knowledge

thereof,[1] if the creditor, without the assent of the surety, alters the original contract or obligation of the principal[2] [except to the benefit of the surety[3]], or if, in any degree whatever,[4] he impairs[5] his remedy, or suspends his right to proceed[6] against the principal,[7] the surety is exonerated, except so far as he may be indemnified by the principal.[8]

discharge the surety.

[1] Gahn *v.* Niemcewicz, 11 *Wend.*, 312; Elwood *v.* Deifendorf, 5 *Barb.*, 398.

[2] Ludlow *v.* Simond, 2 *Cai. Cas.*, 1.

[3] Ellis *v.* McCormick, 1 *Hilt.*, 313; Ogden *v.* Rowe, 3 *E. D. Smith*, 312. The omission of this clause is recommended. See Leeds *v.* Dunn, 10 *N. Y.*, 475.

[4] Bangs *v.* Strong, 7 *Hill*, 250, aff'g S. C., 10 *Paige*, 11.

[5] Hall *v.* Constant, 2 *Hall*, 185; Vilas *v.* Jones, 1 *N. Y.*, 274, aff'g S. C., 10 *Paige*, 76; Bower *v.* Teirmann, 3 *Denio*, 378.

[6] Huffman *v.* Hulburt, 13 *Wend.*, 377.

[7] Reynolds *v.* Ward, 5 *Wend.*, 501; Hall *v.* Constant, 2 *Hall*, 185; Gahn *v.* Niemcewicz, 11 *Wend.*, 312, aff'g S. C., 3 *Paige*, 614; Newsam *v.* Finch, 25 *Barb.*, 175.

[8] Moore *v.* Paine, 12 *Wend.*, 123.

§ 1367. Mere delay on the part of the creditor to proceed against the principal, or to enforce any other remedy, does not exonerate the surety.

Delay of creditor does not discharge a surety.

Williams *v.* Townsend, 1 *Bosw.*, 411; Albany Dutch Church *v.* Vedder, 14 *Wend.*, 165; Sailly *v.* Elmore, 2 *Paige*, 497; Schroeppell *v.* Shaw, 3 *N. Y.*, 446, aff'g S. C., 5 *Barb.*, 580.

§ 1368. After the surety has been indemnified by the debtor, he is liable to the creditor to the extent of the indemnity, notwithstanding the creditor, without the surety's assent, may have modified the contract or released the principal.

A surety indemnified by the debtor is not exonerated.

Supreme Ct., 1834, Moore *v.* Paine, 12 *Wend.*, 123; Pratt *v.* Adams, 7 *Paige*, 615; Ten Eyck *v.* Holmes, 3 *Sandf. Ch.*, 428.

§ 1369. After the creditor has recovered judgment against the surety, the surety is liable to the creditor as a principal; but on satisfying the judgment, or any part thereof, he is entitled to the extent of what he has satisfied, to whatever remedies against the original debtor the creditor may then possess.

Judgment against surety makes him liable as principal.

The weight of authority seems to be, at any rate in the later cases, that judgment against the surety should not be regarded in a court of equity, as impairing the

relation of the surety. (Bangs *v.* Strong, 7 *Hill*, 250; Schroeppell *v.* Shaw, 3 *N. Y.*, 446, aff'g S. C., 5 *Barb.*, 580; Bay *v.* Tallmadge, 5 *Johns. Ch.*, 305; Delaplaine *v.* Hitchcock, 11 *Barb.*, 159; Boughton *v.* Bank of Orleans, 2 *Barb. Ch.*, 458; Hubbell *v.* Carpenter, 5 *Barb.*, 520, reversing S. C., 2 *id.*, 484; La Farge *v.* Hester, 9 *N. Y.*, 241; Storms *v.* Thorn, 3 *Barb.*, 314.) But the above seems the more reasonable rule.

**Exonerated by offer of satisfaction**

§ 1370. Where satisfaction of the principal obligation, or due offer of satisfaction, is made, whether by the principal or by a third person, the surety is exonerated.

Elmendorph *v.* Tappen, 5 *Johns.*, 176.

**Surety not discharged by act of law discharging principal.**

§ 1371. Where the liability of the principal is discharged by act of law and not through the intervention or omission of the creditor, the surety is not exonerated.

Bowery Savings Bank *v.* Clinton, 2 *Sandf.*, 113; Storm *v.* Waddell, 2 *Sandf. Ch.*, 494.

## ARTICLE III.

### THE RIGHTS OF A SURETY.

SECTION 1372. Surety may require the creditor to proceed against the principal.
1373. A principal bound to re-imburse his surety.
1374. The surety acquires the right of the creditor.
1375. The property of principal to be taken first.
1376. A surety pledging property alone.

**Surety may require the creditor to proceed against the principal.**

§ 1372. The surety may require his creditor to proceed against the principal, or pursue any other remedies in his power which the surety cannot himself pursue, and which would lighten his burden, on offering to indemnify the principal against loss by so doing; and if in such case the creditor neglects to do so, and the recovery from the principal is lost in consequence, the surety is exonerated.

This seems on the whole to be the more reasonable rule, though the authorities do not fully sustain it. See Hayes *v.* Wood, 4 *Johns. Ch.*, 123; Pain *v.* Packard, 13 *Johns.* 174; King *v.* Baldwin, 17 *Johns.*, 384, revers. S. C., 2 *Johns. Ch.*, 554; Fulton *v.* Matthews, 15 *Johns.*, 433; Valentine *v.* Farrington, 2 *Edw.*, 53; Warren *v.* Beardsley, 8 *Wend.*, 195; Schroeppell *v.* Shaw, 3 *N. Y.*, 446, affirming S. C., 5 *Barb.*, 580.

§ 1373. If the surety satisfies the obligation for which he has become liable as surety, or any part thereof, whether with or without legal proceedings,[1] the principal is bound to re-imburse what he has disbursed,[2] including necessary costs and expenses; but the surety has no claim for re-imbursement against other persons, though they may have been benefited by his act.[3]

A principal bound to re-imburse his surety.

[1] Mauri *v.* Hefferman, 13 *Johns.*, 58; Vechte *v.* Brownell, 8 *Paige*, 212.

[2] Bonney *v.* Seely, 2 *Wend.*, 481; Hunt *v.* Amidon, 4 *Hill*, 345; Jones *v.* Steinburgh, 1 *Barb. Ch.*, 250; Cobb *v.* Titus, 10 *N. Y.*, 198; Hunt *v.* Amidon, 4 *Hill*, 345; Seely *v.* Champlain, 4 *Johns.*, 461.

[3] Laws of 1858, 506, ch. 314, § 3.

[4] Tom *v.* Goodrich, 2 *Johns.*, 213.

§ 1374. The surety, upon satisfying the obligation, is entitled to enforce every remedy which the creditor had against the principal, to the extent of reïmbursing what he has expended.

The surety acquires the right of the creditor

Hayes *v.* Ward, 4 *Johns. Ch.*, 123; Bullock *v.* Boyd, *Hoffm.*, 294; Van Horne *v.* Everson, 13 *Barb.*, 526; Cuyler *v.* Ensworth, 6 *Paige*, 32.

§ 1375. Whenever property of a surety is pledged with the property of the principal, the surety is entitled to have the property of the principal first applied to the discharge of the principal's obligation.

The property of principal to be taken first.

Vartie *v.* Underwood, 18 *Barb.*, 561.

§ 1376. The provisions of sections 1373, 1374 and 1375, apply where the surety has only pledged his property, as well as where he is personally bound.

A surety pledging property alone.

Gahn *v.* Niemcewicz, 11 *Wend.*, 312; affg. S. C., 3 *Paige*, 614.

## CHAPTER II.

### GUARANTY.

SECTION 1377. Guaranty defined.
1378. Guarantor.
1379. Necessity of a consideration.
1380. Guaranty to be in writing, &c.
1381. What engagement to answer for obligation of another is not guaranty.
1382. Continuing guaranties.
1383. Revocation.

SECTION 1344. A guaranty, how construed.
1345. Liability upon guaranty of payment or performance.
1346. Liability upon guaranty of a conditional obligation.
1347. A guaranty that an obligation is good or collectable.
1348. Guarantor's liability upon such a guaranty.

Guaranty defined.

§ 1377. A guaranty is a contract of suretyship whereby the surety engages to satisfy the obligation of the principal, if the principal fails to do so himself.

Guarantor.

§ 1378. A person may become guarantor even without the knowledge of the principal.

Code Nap., art. 2014.

Necessity of a consideration.

§ 1379. Where a guaranty is entered into at the same time with the original obligation, or with its acceptance by the person guaranteed, and forms, with that obligation, a part of the consideration to him, no other conideration need exist. In all other cases there must be a consideration distinct from that of the original obligation.

See Mallory v. Gillett, 21 N. Y., 412.

Guaranty to be in writing, &c.

§ 1380. A guaranty must be in writing, signed by the guarantor or his agent, and express the consideration.

2 R. S., 135, § 2, sub. 2. It may be worthy of consideration whether the words requiring the consideration to be expressed, should not be omitted. They were introduced in the revision of 1830, under the expectation, it seems, that they would mitigate the litigation arising out of this provision (see Rogers v. Kneeland, 13 *Wend.*, 114), but have greatly extended the labyrinth of conflicting cases on this subject. So common a form of transaction as a guaranty ought not to be the subject of such uncertain and nice distinctions as those which abound in the books.

Since the testimony of the parties is now admissible, the statute of frauds is less important to its primary object than before. In the next section, the criterion by which to distinguish a guaranty from an original undertaking is given; and if the guaranty is required to be in writing, perhaps the consideration may be left to be gathered from the terms of the instrument, or even to be supplied by parol, as in other cases. Barnes v. Perine, 15 *Barb.*, 249; affirmed, 12 *N. Y.*, 18; Frink v. Green, 5 *Barb.*, 455. The change here suggested has been adopted in England, by stat. 19 and 20 *Vict.*, c. 97, and a guaranty there is no longer required to express any consideration. See Holmes v. Mitchell, 7 *C. B.* (*N. S.*), 370.

See many of the cases on the present rule reviewed in Mallory v. Gillett, 21 *N. Y.*, 412.

§ 1381. An engagement to answer for the obligation of another person, made in terms or under circumstances such that the promisor becomes a principal debtor, upon a new consideration to himself, and the original debtor becomes, in effect, his surety, is not a guaranty within the meaning of the preceding section.

**What engagement to answer for obligation of another not guaranty.**

State Bank *v.* Mettler, 2 *Bosw.*, 392; Beach *v.* Hungerford, 19 *Barb.*, 258.

§ 1382. A guaranty relating to a future liability of the principal, under successive transactions, which either continue his liability or from time to time renew it after it has been satisfied, is called a continuing guaranty.

**Continuing guaranties.**

§ 1383. A continuing guaranty may be revoked at any time by the guarantor, as to future transactions, unless there is a continuing consideration as to such transactions which he does not renounce.

**Revocation.**

1 Pars. on Contr., 517. There seems no sufficient reason for preserving the exception in the case of guaranties under seal.

§ 1384. A guaranty is to be deemed an unconditional guaranty of payment or performance, unless its terms import some condition precedent to the liability of the guarantor.

**A guaranty, how construed.**

Morris *v.* Wadsworth, 11 *Wend.*, 100; 17 *id.*, 103; Smith *v.* Dunn, 6 *Hill*, 543.

§ 1385. A guarantor of payment or performance is liable to the person guaranteed immediately upon the principal's default,[1] and without proof of demand and notice.[2]

**Liability upon guaranty of payment in performance.**

[1] Van Rensselaer *v.* Miller, *Hill & D. Supp.*, 237; Bank of N. Y. *v.* Livingston, 2 *Johns. Cas.*, 409; Loveland *v.* Shepard, 2 *Hill*, 139; Moakley *v.* Riggs, 19 *Johns.*, 69; Grant *v.* Hotchkiss, 26 *Barb.*, 63; Thomas *v.* Woods, 4 *Cow.*, 173; Backus *v.* Shipherd, 11 *Wend.*, 629.

[2] Allen *v.* Rightmere, 20 *Johns.*, 365; Clark *v.* Burdett, 2 *Hall*, 197; Kemble *v.* Wallis, 10 *Wend.*, 374; Morris *v.* Wadsworth, 11 *id.*, 100; 17 *id.*, 103.

§ 1386. Where one guarantees a conditional obligation, his liability is commensurate with that [illegible] and he is not entitled to notice of [illegible]

**Liability upon guar[illegible] of a [illegible]itional [illegible]ation.**

unless the condition is exclusively within the creditor's knowledge.

Douglass *v.* Howland, 24 *Wend.*, 35.

A guaranty that an obligation is good or collectable.

§ 1387. A guaranty that an obligation is good, or that it is collectable, or in equivalent terms, imports that the obligor is solvent, and that the demand is collectable by the usual legal proceedings taken with reasonable diligence.

Curtis *v.* Smallman, 14 *Wend.*, 231; Cooke *v.* Nathan, 16 *Barb.*, 342; Van Derveer *v.* Wright, 6 *id.*, 547.

Guarantor's liability upon such guaranty.

§ 1388. In the cases mentioned in the preceding section, the removal of the principal from the state, leaving no property therein from which the obligation might be satisfied, is equivalent to the insolvency of the principal in its effect on the rights and obligations of the surety.

This is the principle adopted in Cooke *v.* Nathan, 16 *Barb.*, 342; but White *v.* Case, 13 *Wend.*, 543; Burt *v.* Horner, 5 *Barb.*, 501; Newell *v.* Fowler, 23 *Barb.*, 628, are to the contrary.

## CHAPTER III.

### LETTER OF CREDIT.

SECTION 1389. Letter of credit defined.
1390. Liability of the writer.
1391. Letters of credit either general or special.
1392. Nature of general letter of credit.
1393. A letter of credit may be a continuing guaranty.
1394. When notice to the writer necessary.
1395. The credit given must agree with the terms of the letter.

Letter of credit defined.

§ 1389. A letter of credit is a written request addressed by one person to another, requesting the latter to give credit to the person in whose favor it is drawn. It may be addressed to several persons in succession and must express a consideration.

As to the last clause see note to § 1380, *supra*.

Liability of the writer.

§ 1390. Upon the debtor's default, the writer of the letter of credit is liable to those who gave credit in compliance with its terms.

Letter of credit either gene-

§ 1391. Letters of credit are either general or special. When the request[1] is addressed to specified persons by

name or description, the letter is special. All other letters of credit are general.[2]

ral or special.

[1] That the mere fact of the letter being addressed to a particular person does not make it a special letter, see Benedict *v.* Sherrill, *Hill & D. Supp.*, 219.

[2] Union Bank *v.* Coster, 3 *N. Y.*, 203; affirming S. C., 1 *Sandf.*, 563.

Nature of general letter of credit.

§ 1392. A general letter of credit gives any person to whom it may be shown, authority to comply with its request, and by his so doing it becomes, as to him, of the same effect as if addressed to him by name. Several persons may successively give credit upon a general letter.

Union Bank *v.* Coster, 3 *N. Y.*, 203; affg. S. C., 1 *Sandf.*, 563.

A letter of credit may be a continuing guaranty.

§ 1393. If the letter of credit in its terms contemplates a course of future dealing between the parties, it is not exhausted by giving a credit, even to the amount limited by the letter, which is subsequently reduced or satisfied by payments made by the debtor; but is to be deemed a continuing guaranty.

Gates *v.* McKee, 13 *N. Y.*, 232; and compare Fellows *v.* Prentiss, 3 *Denio*, 512.

When notice to the writer necessary.

§ 1394. Unless the terms of the letter express or imply the necessity of giving notice of acceptance to the writer, he is liable for credit given upon it without notice to him.

Whitney *v.* Groot, 24 *Wend.*, 82; Union Bank *v.* Coster, 3 *N. Y.*, 203; affg. S. C., 1 *Sandf.*, 563; Douglass *v.* Howland, 24 *Wend.*, 35; Smith *v.* Dann, 6 *Hill*, 543.

The credit given must agree with the terms of the letter.

§ 1395. If a letter of credit prescribes the persons by whom, or the mode in which, the credit is to be given, or the term of credit, or limits the amount thereof, the writer is not bound except for transactions which conform strictly to the mode and term prescribed, and are within the limit fixed.

Brickhead *v.* Brown, 5 *Hill*, 634, affirmed, 2 *Denio*, 375.

No other person than the one to whom a special letter of credit is addressed, can, by acting upon it, create any obligation against the writer. Brickhead *v.* Brown, 5 *Hill*, 634; affirmed, 2 *Denio*, 375; Robbins *v.* Bingham, 4 *Johns.*, 476; Walsh *v.* Bailie, 10 *id.*, 180.

If a special letter is addressed to several jointly, the credit must be given by all, or the writer is not liable. Penoyer *v.* Watson, 16 *Johns.*, 100.

The person to whom a special letter is addressed cannot render the writer liable upon it by procuring strangers to give credit to the holder of it. Robbins *v.* Bingham, 4 *Johns.*, 476; Walsh *v.* Bailie, 10 *id.*, 180.

Guaranty for 6 months' credit does not cover a 4 months' credit. Leeds *v* Dunn, 10 *N. Y.*, 475.

# TITLE XVI.

## PLEDGE.

SECTION 1396. Definition of pledge.
1397. Delivery essential to validity of pledge.
1398. Increase of thing.
1399. Who may pledge.
1400. Pledge lender defined.
1401. Stakeholder.
1402. When pledge lender may withdraw thing pledged.
1403. Obligations of stake holders.
1404. Stakeholder must enforce rights of a pledgee.
1405. Obligations of pledgee, stakeholder, reward, &c.
1406. Pledge, security for what.
1407. Apportionment of pledge.
1408. Debtor's misrepresentation of value of pledge.
1409. Pledger's right of redemption.
1410. Sale of thing pledged.
1411. Notice of sale to pledger.
1412. Pledger's sale of securities.
1413. Surplus to be paid to pledger
1414. Sale on the demand of the pledger.
1415. Pledgee's purchase of thing pledged.
1416. Pledge does not suspend pledger's right of action.
1417. Statute of limitation not affecting pledge.
1418. Extinguishment of contract of pledge.

**Definition of pledge**

§ 1396. Pledge is a deposit by way of security for the performance of an obligation.[1]

Story on Bailm., § 286.

**Delivery essential to validity of pledge.**

§ 1397. No pledge is valid until the thing pledged is delivered to the pledgee, or to a stakeholder, as hereafter prescribed.

**Increase of thing.**

§ 1398. The increase of property is pledged with the property.

§ 1399. A thing may be pledged

Who may pledge.

1. By its owner;

2. By one having a lien, to the extent of such lien;[1]

3. By one who has been allowed by the owner to assume the apparent ownership thereof, to a pledgee taking it in good faith and for value.

[1] This is the law in England. It goes a little beyond the present law of this state, but seems only just.

§ 1400. The owner of a thing may pledge it as security for the obligation of another person, and in so doing has all the rights of a pledger for himself, except as hereinafter stated.

Pledge lender defined.

§ 1401. The pledger and his creditor may agree upon a third person with whom to deposit the thing pledged. Such person, if he accepts the deposit, is called a stakeholder.

Stakeholder.

§ 1402. The person pledging for another, as mentioned in section 1400, cannot withdraw the thing pledged otherwise than as a pledger for himself might; and if he receives a consideration from the debtor for the pledge, he cannot withdraw it without his consent.

When pledge-lender may withdraw thing pledged.

§ 1403. A stakeholder for reward cannot exonerate himself from his undertaking; and a gratuitous stakeholder can do so only by giving reasonable notice to the pledger and creditor to appoint a new stakeholder, and, in case of their failure to agree, by depositing the thing pledged with some impartial person, who will then be entitled to a reasonable compensation for his care of the same.

Obligation of stakeholder.

§ 1404. A stakeholder must rigidly enforce all the rights of the pledgee, unless authorized by him to waive them.

Stakeholder must enforce rights of pledgee.

§ 1405. A pledgee, or a stakeholder for reward, has the duties and liabilities of a depositary for reward. A stakeholder without reward has the duties and liabilities of a gratuitous depositary.

Obligation of pledgee, stakeholder for reward, &c.

§ 1406. The pledgee cannot retain the thing pledged as security for the performance of any obligation other than

Pledge, security for what.

that on account of which it was pledged.[1] But he may acquire and enforce a lien in like manner with a gratuitous depositary.

[1] Jarvis v. Rogers, 15 *Mass.*, 389.

Apportionment of pledge.

§ 1407. The pledgee is not bound to restore any part of the thing pledged, even though it is divisible, on a partial fulfillment of the principal obligation.[1]

[1] Code of La., arts. 3130, 3131, 3138.

Debtor's misrepresentation of value of pledge.

§ 1408. If the debtor wilfully misrepresents the value of the thing pledged to the creditor, the latter may demand a further pledge to correspond with the value represented; and in default thereof may recover his debt immediately, though it be not actually due.[1]

[1] Code of La., art. 3141.

Pledger's right of redemption

§ 1409. No agreement for an absolute forfeiture of the thing pledged to the creditor is valid; and the pledger's right to redeem can be barred only by sale of the property.

Sale of thing pledged.

§ 1410. Upon the maturity of the obligation to which the pledge is accessory the creditor may demand its fulfillment, and upon a refusal may collect his debt out of the pledge by selling it, except as specified in the next section, upon giving, in a reasonable time before the sale, personal notice to the pledger of the time and place of sale,[1] and upon making the sale in the most usual manner,[2] and for the highest obtainable price.

Such power to sell is a trust, and is governed by the title on TRUSTS.

[1] Wheeler v. Newbould, 16 *N. Y.*, 399.

[2] Dykers v. Allen, 7 *Hill*, 497.

Notice of sale to pledger.

§ 1411. Notice of the sale may be waived by the pledger at the time of the demand of the debt. But a waiver before that time, or a waiver of demand, is void.[1]

[1] Wilson v. Little, 2 *N. Y.*, 443.

Pledgee's sale of securities.

§ 1412. The pledgee cannot, without a special authority from the pledger, sell any evidences of debt, except the obligations of governments, states, or corporations, but he may collect the same when due.

Wheeler v. Newbould, 16 *N. Y.*, 397, limited by the exception.

§ 1413. After deducting from the proceeds of the pledge the amount due under the principal contract, and the expenses of sale or collection, the pledgee must pay the surplus to the pledger.

Surplus to be paid to pledger.

§ 1414. The pledger may at any time require the thing pledged to be sold, if the proceeds will cover the debt, and the proceeds to be applied to the payment of the debt if due, or held as security for the fulfillment of the obligation and if the amount that will become due on such obligation can be ascertained, he may require the surplus to be paid to him immediately after such sale.

Sale on the demand of the pledger.

§ 1415. The pledgee, stakeholder or creditor, cannot purchase the thing pledged except by direct dealing with the pledger.[1]

Pledgee's purchase of thing pledged.

[1] Story on Bailm., § 319; see Dykers *v.* Allen, 7 *Hill*, 497. See also the title on TRUSTS.

§ 1416. The mere existence of a pledge does not suspend the right of the creditor to proceed against the debtor personally upon the principal contract, without selling the thing pledged.[1]

Pledge does not suspend pledgee's right of action.

[1] Story on Bailm., § 315; see Wheeler *v.* Newbould, 16 *N. Y.*, 398.

§ 1417. The thing pledged may be retained, although the principal debt is barred by the statute of limitations.[1]

Statute of limitations.

[1] Story on Bailm., § 362.

§ 1418. The contract of pledge is extinguished:

Extinguishment of contract of pledge.

1. By the extinction of the principal obligation;[1]
2. By due offer to perform such obligation;[2]
3. By the consent of the parties;
4. By the restoration of the thing pledged to the pledger by the pledgee, unless such restoration is for a merely temporary purpose;[3]
5. By the extinction of the thing pledged.[4]

[1] Story on Bailm., § 359, 360, 361.
[2] See *ante*, § 641.
[3] Sto. Bailm., § 229.
[4] Id., 363.

# TITLE XVII.

## MORTGAGE.

CHAPTER I. Mortgages in General.
II. Mortgage of Real Property.
III. Mortgage of Personal Property.

## CHAPTER I.

### MORTGAGES IN GENERAL.

ARTICLE I. Nature of a mortgage.
II. Effect of a mortgage.
III. Rights and obligations of the parties.
IV. Extinction of mortgages.

## ARTICLE I.

### NATURE OF A MORTGAGE.

SECTION 1419. Mortgage, what.
1420. What are deemed mortgages.
1421. Independent or accessory
1422. What may be mortgaged
1423. Agreements in restraint of redemption.
1424. Power of sale.
1425. Vessels.

**Mortgage, what.**

§ 1419. A mortgage is a transfer of a thing subject to defeasance on the performance of a condition, and made as a security for such performance.[1]

[1] A mortgage of real property is sometimes called a pledge thereof. (See Robinson *v.* Williams, 22 *N. Y.*, 382; Power *v.* Lester, 23 *id.*, 531; Code La., 3246.)

**What are deemed mortgages.**

§ 1420. Every transfer of things, other than a pledge, made for the purpose of a mere security for the performance or non-performance of an act, is deemed a mortgage.[1]

[1] Hodges *v.* Tenn. Ins. Co., 8 *N. Y.*, 416; Clark *v.* Henry, 2 *Cow.*, 327.

**Independent or accessory.**

§ 1421. A mortgage may be an independent or an accessory contract. It is accessory if made to secure the

performance of a separate obligation. In other cases it is independent.

What may be mortgaged.

§ 1422. Any interest in a thing may be mortgaged, even if such thing is at the time possessed by a person claiming adversely to the mortgagor.[1]

[1] 1 R. S., 739, § 148.

Agreements in restraint of redemption.

§ 1423. No agreement in restraint of the mortgagor's right to redeem is valid, unless made subsequently to the mortgage, and upon a new consideration.[1] But the mortgagor may at any time agree to give the mortgagee a preemptive right to the thing in case of sale.[2]

[1] Ct. of Errors, Clark *v.* Henry, 2 *Cow.*, 324; Holridge *v.* Gillespie, 2 *Johns. Ch.*, 30.
[2] 4 Kent Com.

Power of sale.

§ 1424. A power of sale may be conferred by the mortgage upon the mortgagee[1] or any other person, to be exercised upon breach of the condition of the mortgage. Such a power is a trust,[2] and can be executed only in the manner prescribed by the CODE OF CIVIL PROCEDURE.[3]

[1] Wilson *v.* Troup, 7 *Johns. Ch.*, 25.
[2] Jencks *v.* Alexander, 11 *Paige*, 619.
[3] As reported complete.

Vessels.

§ 1425. The provisions of this title do not apply to mortgages of vessels which are required by the laws of the United States to be registered in a custom-house, and which are thus registered.

## ARTICLE II.

### EFFECT OF A MORTGAGE.

SECTION 1426. On what a lien.
1427. Against whom a lien.
1428. Mortgage of thing held adversely.

On what a lien.

§ 1426. A mortgage is a lien upon everything that would pass by a grant of the thing,[1] and on nothing more.[2]

[1] Snedeker *v.* Waring, 12 *N. Y.*, 170; Gardner *v.* Finley, 19 *Barb.*, 317; Shepard *v.* Philbrick, 2 *Denio*, 174; Robinson *v.* Renwick, 3 *Edw. Ch.*, 245.
[2] Lawrence *v.* Delano, 3 *Sandf.*, 333.

Against whom a lien.

§ 1427. The thing mortgaged is bound by the mortgage, in the hands of every one claiming under the mortgagor subsequently to its execution, except purchasers or incumbrancers in good faith, without notice and for value.[1]

[1] Query, whether "a good consideration" should not be substituted for "value"?

Mortgage of thing held adversely.

§ 1428. A mortgage of a thing held adversely to the mortgagor takes effect from the time at which he, or those claiming under him, obtain possession thereof. But it has precedence over every lien upon the mortgagor's interest in such thing, created subsequently to the recording of the mortgage.[1]

[1] 1 R. S., 739, § 148.

## ARTICLE III.

### RIGHTS AND OBLIGATIONS OF THE PARTIES.

SECTION 1429. Redemption.
1430. Foreclosure.
1431. Mortgage not a personal obligation.
1432. Waste.

Redemption.

§ 1429. The mortgagor may redeem the thing mortgaged at any time before his right of redemption is foreclosed,[1] by performing, or offering to perform, the condition of the mortgage, and paying, or offering to pay, the damages to which the mortgagee is entitled for delay.[2]

[1] Pratt *v.* Stiles, 9 *Abb. Pr.*, 150; Hinman *v.* Judson, 13 *Barb.*, 629.

[2] See Kortright *v.* Cady, 21 *N. Y.*, 343.

Foreclosure

§ 1430. The mortgagee has a right to foreclose the mortgagor's right of redemption. Such right is enforced in the manner prescribed by the CODE OF CIVIL PROCEDURE.[1]

[1] As reported complete.

Mortgage not a personal obligation.

§ 1431. A mortgage does not bind the mortgagor personally to perform the act for the performance of which it is a security, unless there is an express covenant therein to that effect.[1]

[1] 1 R. S., 738, § 139; Hone *v.* Fisher, 2 *Barb. Ch. R.*, 569.

§ 1432. No person bound by the mortgage may do any act which will substantially impair the mortgagee's security. Waste.

Van Pelt *v.* McGraw, 4 *N. Y.*, 111; Gardner *v.* Heartt, 3 *Denio*, 232; see Manning *v.* Monaghan, 23 *N. Y.*, 539, 548.

## ARTICLE IV.

### EXTINCTION OF MORTGAGES.

SECTION 1433. How extinguished.

§ 1433. A mortgage which is merely accessory to an independent obligation is extinguished How extinguished.

1. By the extinction of the principal obligation;[1]
2. By an offer of performance thereof, duly made.[2]

[1] Ct. of Errors, Green *v.* Hart, 1 *Johns.*, 580. The statute of limitations does not *extinguish* an obligation, (Waltermire *v.* Westover, 14 *N. Y.*, 16,) and the mortgage remains in force after the debt is barred. (Pratt *v.* Huggins, 29 *Barb.*, 277.)

[2] Kortright *v.* Cady, 21 *N. Y.*, 343; Stoddard *v.* Hart, 23 *N. Y.*, 556.

# CHAPTER II.

## MORTGAGE OF REAL PROPERTY.

ARTICLE I. Creation and effect of the mortgage.
II. Recording.

## ARTICLE I.

### CREATION AND EFFECT OF THE MORTGAGE.

SECTION 1434. How created.
1435. Right of possession.
1436. Mortgages on lands inherited or devised, by whom to be paid.

§ 1434. The mortgage can be created, renewed or extended, only by writing,[1] with the formalities required in the case of a grant of real property, or by a deposit of the Mortgage, how created

title deeds of the property; or the principal part of them,[2] with intent to mortgage the same.[3]

[1] Stoddard *v.* Hart, 23 *N. Y.*, 556.
[2] Lacon *v.* Allen, 3 *Drewry*, 579.
[3] Rockwell *v.* Hobby, 2 *Sandf. Ch.*, 9. But whether such deposit is anything more than evidence of an agreement to execute a mortgage, *query?* See Stoddard *v.* Hart, 23 *N. Y.*, 561.

**Right of possession.**

§ 1435. A mortgage of real property does not transfer the title[1] to the property mortgaged, and the mortgagee is not entitled to the possession thereof,[2] except by the consent of the mortgagor, but such consent when given cannot be revoked.[3]

[1] Kortright *v.* Cady, 21 *N. Y.*, 343, 364; Stoddard *v.* Hart, 23 *id.*, 556, 560; Power *v.* Lester, 23 *id.*, 531.
[2] See 2 R. S., 312, § 57.
See Waring *v.* Smyth, 2 *Barb. Ch. R.*, 135.

**Mortgages on lands inherited or devised, by whom to be paid.**

§ 1436. When real property, subject to a mortgage, passes by succession or will, the successor or devisee must satisfy such mortgage out of his own property, without resorting to the executor or administrator of the mortgagor, unless there is an express direction in the will of the mortgagor, that the mortgage shall be otherwise paid.

1 R. S., 749, § 4.

## ARTICLE II.

### RECORDING.

SECTION 1437. How recorded.
1438. What must be recorded as a mortgage.
1439. Recording assignment.
1440. Discharge of records.
1441. Certificate of discharge.

**How recorded.**

§ 1437. Mortgages may be recorded in like manner with grants of real property, except that they must be recorded in books kept for mortgages exclusively. Such record operates as notice to all subsequent incumbrancers.[1]

[1] 1 R. S., 756.

**What must be recorded as a mortgage.**

§ 1438. Every grant of real property or of any interest therein, which appears, by any other writing, to be intended as a mortgage within the meaning of chapter I. of this title,

must be recorded as a mortgage; and if such grant and other writing explanatory of its true character are not recorded together, at the same time and place, the grantee can derive no benefit from such record.[1]

[1] 1 R. S., 756, § 3.

Recording assignment

§ 1439. An assignment of a mortgage may be recorded in like manner with a mortgage, but in a separate book, and such record operates as notice to all persons subsequently deriving title to such mortgage from the assignor.[1]

[1] Vanderkemp *v.* Shelton, 11 *Paige*, 37. This section practically covers the ground of 1 R. S., 763, § 41.

Discharge of records, &c., of mortgage.

§ 1440. Any recorded mortgage must be discharged upon the record thereof, by the officer in whose custody it is, whenever there is presented to him a certificate signed by the mortgagee, his personal representatives or assigns, acknowledged, or proved and certified, as prescribed for grants of real property, specifying that such mortgage has been paid, or otherwise satisfied and discharged.

1 R. S., 761, § 28.

Certificate of discharge, &c., to be recorded.

§ 1441. Every such certificate, and the proof or acknowledgement thereof, must be recorded at length; and a reference made to the book and page containing the record, in the minute of the discharge of the mortgage, made by the officer upon the record thereof.

1 R. S., 761, § 29.

## CHAPTER III.

### MORTGAGE OF PERSONAL PROPERTY.

ARTICLE I. Creation and effect of the mortgage.
II. Filing.

## ARTICLE I.

### CREATION AND EFFECT OF THE MORTGAGE.

SECTION 1442. How made.
1443. Transfer of title.
1444. Foreclosure.

How made.

§ 1442. A mortgage of personal property may be made orally[1] or in writing.

[1] See Bank of Rochester *v.* Jones, 4 *N. Y.*, 497.

Transfer of title.

§ 1443. The title to the thing mortgaged is transferred by the mortgage to the mortgagee,[1] who may require the immediate possession thereof,[2] unless it is otherwise agreed between the parties.[3]

[1] See Bank of Rochester *v.* Jones, 4 *N. Y.*, 507; Butler *v.* Miller, 1 *N. Y.*, 496; Southworth *v.* Isham, 3 *Sandf.*, 448.
[2] Rich *v.* Milks, 20 *Barb.*, 616; Stuart *v.* Taylor, 7 *How. Pr.*, 251; Stewart *v.* Hanson, 35 *Me.*, 508; Holmes *v.* Sproul, 31 *Me.*, 73; Libby *v.* Cushman, 29 *Me.*, 429.
[3] Van Hassell *v.* Borden, 1 *Hilton*, 128.

Foreclosure

§ 1444. The mortgagee may foreclose the mortgagor's right of redemption by a sale of the thing, made in the manner and upon the notice prescribed by the title on PLEDGE, or by proceedings under the CODE OF CIVIL PROCEDURE.[1]

[1] See Patchin *v.* Pierce, 12 *Wend.*, 63; Hart *v.* Ten Eyck, 2 *Johns. Ch.*, 100, and cases cited. The reference is to the Code reported complete.

## ARTICLE II.

### FILING.[1]

SECTION 1445. Mortgage must be filed.
1446. How filed.
1447. Renewal of filing.
1448, 1449. Duty of officers.
1450. Certain errors to be disregarded.
1451. Negligence of officer.
1452. Copy, &c., when evidence.

[1] This article is framed in conformity to the law as it at present exists, but the commissioners recommend that the whole article be dropped, and all mortgages be recorded in a uniform manner.

Mortgage must be filed.

§ 1445. The mortgage is void as against creditors of the mortgagor, and subsequent purchasers and incumbrancers in good faith without notice, unless it is filed as hereafter prescribed.[1]

[1] 3 R. S. (5th ed.), 222; Laws 1833, ch. 279.

How filed.

§ 1446. The mortgage is duly filed by depositing the original, or a copy,

1. In the office of the county register of deeds, if there is one, and his office is situated in the town wherein the mortgagor resides at the time of executing the mortgage, or, if he does not reside in the State, the town wherein the property mortgaged is at such time situated;

2. If there is no register's office so situated, then in the county clerk's office, if it is so situated;

3. If such office is not so situated, then in the office of the clerk of such town.[1]

[1] 3 R. S. (5th ed.), 223; Laws 1833, ch. 279; as modified by various laws establishing registers' offices in different counties, as, for example, Laws 1852, p. 77.

Renewal of filing.

§ 1447. The mortgage ceases to be valid, as against creditors of the mortgagor and subsequent purchasers or incumbrancers in good faith, after the expiration of one year from the filing thereof, unless, within thirty days next preceding the expiration of such term, a copy of such r gage, and a statement of the amount of existing

which the mortgagee claims a lien, subscribed by him, are filed anew in the office of the clerk or register, in the town in which the mortgagor then resides, or, if he does not then reside in the State, in the same office in which the mortgage was originally filed.[1] And, in like manner, the mortgage and statement of debt must be refiled from year to year, or it ceases to be valid,[2] as against the parties abovementioned.

[1] 3 R. S. (5th ed.), 223; Laws 1833, ch. 279; slightly modified, so as to make the section more explicit.
[2] Nitchie *v.* Townsend, 2 *Sandf.*, 299.

Duty of officers.

§ 1448. The officers mentioned in the last section must receive and file all such instruments as are offered to them under this article, and indorse thereon the time of receiving the same, and must keep the same in their offices for the inspection of the public.

1 R. S. (5th ed.), 223; Laws 1833, ch. 279.

Id.

§ 1449. Every officer with whom an instrument is filed, pursuant to this chapter, must indorse a number upon the same in regular order, and enter the name of every party thereto in a book kept for the purpose, alphabetically, placing mortgagors and mortgagees under a separate head, and stating in separate columns, opposite each name, the number indorsed on the instrument, the date thereof and of the filing, the amount secured thereby, and the time at which it is due.[1]

[1] Laws 1849, ch. 69.

Certain errors to be disregarded

§ 1450. An instrument is not to be deemed defectively filed, by reason of any errors in the copy filed, which do not tend to mislead a party interested to his prejudice.[1]

[1] New.

Negligence of officer.

§ 1451. The negligence of the officer with whom the mortgage is filed, cannot prejudice the rights of the mortgagee.[1]

[1] Dodge *v.* Potter, 18 *Barb.*, 193; Bishop *v.* Cook, 13 *id.*, 126.

Copy, &c., when evidence.

§ 1452. A copy of any instrument required to be filed under this article, when certified by the officer with whom it is filed, is presumptive evidence of such filing, in the manner and at the time stated in the official indorsement

on such instrument. The original indorsement is also evidence to the same extent only.[1]

[1] 3 R. S. (5th ed.), 223; Laws 1833, ch. 279.

# TITLE XVIII.

## LIENS.

CHAPTER I. Liens in general.
II. Liens on real property.
III. Liens on personal property in general.
IV. Bottomry.
V. Respondentia.

## CHAPTER I.

### LIENS IN GENERAL.

SECTION 1453. Lien, what.
1454. Mortgages.
1455. Judgments.
1456. Mechanics' liens.
1457. Enforcement of lien.
1458. Priority of liens.
1459. Order of resort to different funds.
1460. Extinction of lien.

§ 1453. A lien is a right to satisfy a claim out of a specific thing, or to retain the same until snch claim is satisfied. Lien, what.

§ 1454. Mortgages are liens, which are regulated by the title on MORTGAGE. Mortgages.

§ 1455. Judgments are liens, which are regulated by the CODE OF CIVIL PROCEDURE. Judgments.

§ 1456. The liens of mechanics, for materials and services upon real property, are regulated by special statutes. Mechanics' liens.

§ 1457. The mode of proceeding by a creditor to enforce a lien within this state, is regulated by the CODE OF CIVIL PROCEDURE.[1] Enforcement of lien.

[1] As reported complete.

Priority of liens.

§ 1458. Other things being equal, different liens upon the same property have priority according to the time of their creation,[1] except in cases of bottomry and respondentia.

[1] Barry v. Mutual Ins. Co., 2 *Johns. Ch.*, 608.

Order of resort to different funds

§ 1459. One who has a lien upon several things, upon one or more of which another has a separate and subsequent lien or claim, must satisfy his lien, if possible, out of the things upon which he has an exclusive lien.[1] If there are several successive liens upon one or more of such things, he must, if he can do so without loss,[2] resort first to that thing upon which the liens are fewest, and so proceed inversely to the number of liens.[3]

[1] Ingalls v. Morgan, 10 *N. Y.*, 186; Besley v. Lawrence, 11 *Paige*, 581; Story Eq. Jur., § 633.
Ct. of Errors, Evertson v. Booth, 19 *Johns.*, 493.
[3] Stuyvesant v. Hall, 2 *Barb. Ch. R.*, 155; Gouverneur v. Lynch, 2 *Paige*, 300.

Extinction of lien.

§ 1460. A lien is extinguishable in like manner with a mortgage.

## CHAPTER II.

### LIENS ON REAL PROPERTY.

SECTION 1461. Lien on real property, what.
1462. Lien of seller.
1463. Against whom valid.
1464. Priority of mortgage for price.

Lien on real property, what.

§ 1461. A lien upon real property is a right to satisfy a claim out of such property, notwithstanding its transfer to another than the debtor.

Lien of seller.

§ 1462. The seller of real property has a lien upon the same for so much of the price as remains unpaid,[1] unless he receives some security for the payment thereof,[2] other than the buyer's personal obligation,[3] or unless he agrees to waive the same.

[1] Garson v. Green, 1 *Johns. Ch.*, 308; 1 Washb. Real Prop., 504; Coote Mort., 218; Sto. Eq. Jur., § 1217; Stafford v. Van Rensselaer, 9 *Cow.*, 218.
[2] Vail v. Foster, 4 *N. Y.*, 312.
[3] Fish v. Howland, 1 *Paige*, 30.

§ 1463. Such lien is valid against every one except a subsequent purchaser or incumbrancer of the property, in good faith, without notice and for value.[1] Against whom valid

[1] Stafford v. Van Rensselaer, 9 *Cow.*, 318. See Bayley v. Greenleaf, 7 *Wheat.*, 46, extending the exception to creditors.

§ 1464. A mortgage, given for the price of real property at the time of its conveyance, has priority over any lien created by judgment against the buyer before that time.[1] Priority of mortgage for price.

[1] 1 R. S., 749, § 5.

## CHAPTER III.

### LIENS ON PERSONAL PROPERTY.

SECTION 1465. Lien on personal property, what.
1466. No lien for unliquidated damages.
1467. Liens general and special.
1468. Lien for service.
1469. What is inconsistent with a lien.
1470. Lien of factors.
1471. Lien of attorneys.
1472. Liens on ships.
1473. Lien of shipmaster.
1474. Lien of seamen.
1475. Termination of lien.

§ 1465. A lien upon personal property is a right to retain it until a claim against its owner is satisfied. Lien on personal property, what.

§ 1466. A mere right to compensation in unliquidated damages, cannot in any case give a right of lien. No lien for unliquidated damages

§ 1467. Liens upon personal property are either general or special. A general lien is one under which the person having the lien is entitled to retain the thing until payment of the whole of his just claims against the owner. A special lien is one under which the person having the lien can retain the thing only until payment for his services on that particular thing. Liens general and special.

§ 1468. Every person who while lawfully in possession of an article of personal property renders any service to the owner thereof by labor or skill employed for the protection, improvement, safe keeping or carriage thereof, has Lien for service.

a lien thereon for such compensation as is due to him for such service, unless he enters into an agreement inconsistent with such lien.[1]

[1] The cases (Scarfe *v.* Morgan, 4 *M & W.*, 283; Jackson *v.* Cummins, 5 *M. & W.*, 342; Steadman *v.* Hockley, 15 *M. & W.*, 553,) support this rule in substance, though it is somewhat extended. See also Baker *v.* Hoag, 7 *N. Y.*, 557.

What is inconsistent with a lien.

§ 1469. An agreement or usage that the owner may withdraw and replace the thing from time to time at his discretion while the contract remains in force, is inconsistent with a lien.[1]

[1] Forth *v.* Simpson, 13 *Q. B.*, 680; Jackson *v.* Cummins, 5 *M. & W.*, 350.

Lien of factor.

§ 1470. A factor has a general lien upon all articles of commercial value that are entrusted to him by the same principal.[1]

[1] Coote Mortg., 283.

Lien of attorneys.

§ 1471. An attorney at law has a lien upon everything that he receives from or on account of his client, to the extent of his claim for services in respect to the particular transaction, action or proceeding, in the course of which he received the thing.[1] He has also a lien upon every claim which he prosecutes by judicial proceedings, for his costs.[2]

[1] Coote Mortg., 284.
[2] Rooney *v.* Second Av. R. R., 18 *N. Y.*, 368.

Lien on ships.

§ 1472. Debts of at least fifty dollars, contracted for the benefit of ships, are liens in the cases provided by the CODE OF CIVIL PROCEDURE.

The reference is to the Code of Civil Procedure as reported complete, p. 606.

Lien of master.

§ 1473. The master of a ship has a lien[1] upon the ship and freight, and upon the cargo to the amount to which the freight is a lien thereon,[2] for advances made and liabilities incurred by him, but has no lien for his wages.[3]

[1] Ingersoll *v.* Van Bokkelin, 7 *Cow.*, 670; 6 *Wend.*, 314.
[2] Poland *v.* Brig Spartan, 1 *Ware*, 134; 3 *Kent*, 197.
[3] By some American authorities this lien is extended to his wages. Drinkwater *v.* Brig Spartan, *Ware*, 149.

§ 1474. The mate and seamen have the same lien, and in addition thereto a lien for their wages. Seaman's lien.

3 Kent, 166.

§ 1475. If the owner of the thing, with the free[1] consent[2] of the person having the lien, resumes possession thereof, the lien is ended,[3] unless the parties otherwise agree,[4] and it is ended, notwithstanding an agreement for its continuance, by such change of possession, as to subsequent purchasers or incumbrancers in good faith, without notice and for value, and as to general creditors of the owner.[5] Termination of lien.

[1] Bigelow *v.* Heaton, 4 *Denio*, 498.
[2] Baker *v.* Hoag, 7 *N. Y.*, 557.
[3] Bigelow *v.* Heaton, 4 *Denio*, 496; Perkins *v.* Boardman, 14 *Gray*, 483.
[4] See Bigelow *v.* Heaton, *supra*.
[5] Ct. of Errors, McFarland *v.* Wheeler, 26 *Wend.*, 467, 482. Possibly the rule is still broader, and such a lien might be held void as to all third persons.

## CHAPTER IV.

### BOTTOMRY.

SECTION 1476. Bottomry, what.
1477. Who may borrow on bottomry.
1478. For what purpose.
1479. When and where ship pledged on bottomry.
1480. Master's authority to hypothecate freight money.
1481. Rate of interest; reduction of.
1482. When money loaned is to be repaid.
1483. Rights of lender when no necessity for bottomry exists.
1484. Bottomry lien, nature of.
1485. Preference of bottomry lien over other liens.
1486. Preference of one bottomry lien over another.

§ 1476. Bottomry is a contract whereby one agrees to repay money loaned on the pledge of a ship, with interest if any is stipulated, on condition that the ship survives certain risks during a specified voyage or period. Bottomry, what.

The brig Draco, 2 *Sumn.*, 157, 191; Thorndike *v.* Stone, 11 *Pick.*, 183.

§ 1477. Money may be borrowed upon bottomry by the owner or by the master of a ship. Who may borrow on bottomry.

For what purpose.

§ 1478. The owner of a ship may pledge her upon bottomry for any lawful purpose.[1] The master may pledge her only for the purpose of procuring repairs or supplies which are necessary for accomplishing the objects of the voyage or securing the safety of the ship.[2]

[1] The brig Draco, 2 *Sumn.*, 186; Greely *v.* Waterhouse, 19 *Maine*, 9; sloop Mary, 1 *Paine*, 671.

[2] The Virgin, 8 *Peters*, 538; Ross *v.* ship Active, 2 *Wash. C. C.*, 227; The Aurora, 1 *Wheat.*, 96.

When and where ship pledged on bottomry.

§ 1479. The owner may pledge the ship by bottomry at any time and place.[1] The master may do so only when he cannot otherwise relieve the necessity of the ship, because he has no adequate funds of the owner within his reach, and can obtain none upon the owner's personal credit,[2] and previous communication with the owner is precluded by the urgent necessity of the case.[3]

[1] Brig Draco, 2 *Sumn.*, 157; The Duke of Bedford, 2 *Hagg. Adm.*, 294; Sloop Mary, 1 *Paine C. C.*, 671.

[2] Tunno *v.* Sloop Mary, *Bee, Adm.*, 120; Ship Packet, 3 *Mason*, 255; Ross *v.* Ship Active, 2 *Wash. C. C.*, 226.

[3] La Ysabel, 1 *Dods.*, 273; Arthur *v.* Barton, 6 *M. & W.*, 138; The Oriental, 3 *W. Rob.*, 243, 2 *Eng. Law & Eq.*, 546.

Master's authority to hypothecate freight money.

§ 1480. The master of a ship may hypothecate the freight money by bottomry, under the same circumstances as those which authorize his pledge of the ship.

The Packet, 3 *Mason*, 255; The Zephyr, *id.*, 341.

Rate of interest; reduction of

§ 1481. Upon a contract of bottomry, the parties may lawfully stipulate for a rate of interest higher than that allowed by the law upon other contracts.[1] But a court of admiralty may reduce the rate stipulated when it appears unjustifiable and exorbitant.[2]

[1] The Atlas, 2 *Hagg.*, 58; 3 Kent Com., 354.

[2] The Zodiac, 1 *Hagg. Adm.*, 326; The Cognac, 3 *id.*, 377.

When money loaned is to be repaid.

§ 1482. Nothing is due to the lender upon bottomry if the ship is lost by any of the enumerated perils before the completion of the specified voyage or period.[1] But he is entitled to payment of the stipulated sum if the ship safely complete

such voyage or period, or if failure to do so is occasioned by other causes than those specified.[2]

[1] Draw, 2 *Sumner*, 157, 191; Thorndike *v.* Stone, 11 *Pick.*, 183; The Atlas, 2 *Hagg.*, 48; Bray *v.* Bates, 9 *Metc.*, 237.

[2] Pope *v.* Nickerson, 3 *Story*, 465, 487, 491; 3 *Kent*, 360.

**Rights of lender when no necessity for bottomry existed.**

§ 1483. If the conditions which alone authorize the master to pledge the ship did not in fact exist, the lender can enforce the contract of bottomry only when after due diligence and inquiry, he had reasonable grounds to believe in the existence of such conditions.

Walden *v.* Chamberlain, 3 *Wash. C. C.*, 290; The Prince of Saxe Coburg, 3 *Hagg. Adm.*, 387; The Orelia, 3 *id.*, 84, 86; The Nelson, 11 *id.*, 176.

**Bottomry lien, nature of.**

§ 1484. The contract of bottomry gives the lender a specific lien upon the ship, but does not bind the owner personally, except so far as he is in possession of the thing pledged, or its value. But this lien does not vest in the lender an absolute and indefeasible interest in the ship, but it is lost by omission to enforce it within a reasonable time.

The Virgin, 8 *Peters*, 554; The Tartar, 1 *Hag. Adm.*, 13; Ship Charles Carter, 4 *Cranch*, 328; Leland *v.* The Medora, 2 *W. & M.*, 105.

**Preference of bottomry lien over other liens.**

§ 1485. A bottomry lien is preferred to every other lien or claim for the voyage upon which it is given, excepting only the lien of the seamen for wages,[1] and the lien of material men for supplies or repairs, indispensable to the safety of the ship.[2]

[1] Madonna *v.* Idra, 1 *Dods. Adm.*, 37, 40; Sydney Cove, *id.*, 1, 13.

[2] The Jerusalem, 2 *Gall.*, 345.

**Preference of one bottomry lien over another.**

§ 1486. Of two or more bottomry liens on the same ship, the later in date has preference.

The Exeter, 1 *Rob. Adm.*, 173.

## CHAPTER V.

### RESPONDENTIA.

SECTION 1487. Respondentia, what.
1488. Who may borrow upon respondentia.
1489. Respondentia by owner.
1490. Respondentia by master.
1491. Rate of interest.
1492. Lien of respondentia.

Respondentia, what.

§ 1487. Respondentia is a contract whereby one agrees to repay money loaned on the security of a cargo, with the interest, if any be stipulated, on condition that the cargo survive certain risks during a specified voyage or period.

3 Kent Com., 354.

Who may borrow upon respondentia.

§ 1488. Money may be borrowed upon respondentia by the owner of the cargo, or by the master of the ship upon which it is laden.

Respondentia by owner.

§ 1489. The owner of the cargo may pledge it upon respondentia, at any time and place, and for any lawful purpose.

Respondentia by master

§ 1490. The master of the ship may pledge the cargo by respondentia only in a case in which he would be authorized to hypothecate ship and freight, but is unable to borrow money upon the security of those, for the repairs or supplies which are necessary for the successful accomplishment of the voyage.

The Gratitudine, 3 *Rob. Adm.*, 214; ship Active, 2 *Wash. C. C.*, 237.

Rate of interest.

§ 1491. The provisions of § 1481, respecting interest upon bottomry loans, apply equally to loans on respondentia.

Lien of respondentia.

§ 1492. The contract of respondentia gives the lender not only a personal claim upon the borrower, but also a specific lien upon the cargo; but it may expressly or by implication give the owner the right to dispose of it, as discharged from the lien.

3 Kent Com., 354; 2 Bl. Com., 458.

# DIVISION FOURTH.

## GENERAL PROVISIONS.

APPLICABLE TO PERSONS, PROPERTY, AND OBLIGATIONS, OR TO TWO OF THOSE SUBJECTS.

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PART I. Relief.
II. Debtor and Creditor.
III. Nuisance.
IV. Maxims of Jurisprudence.
V. Definitions, and General Provisions.


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## PART I.

RELIEF.


TITLE I. Of the Different Kinds of Relief.
II. Compensatory Relief.
III. Specific Relief.
IV. Preventive Relief.


## TITLE I.

OF THE DIFFERENT KINDS OF RELIEF.


SECTION 1493. Compensatory relief.
1494. Specific and preventive relief.


§ 1493. As a general rule, compensation is the relief or remedy provided by law for the violation of private rights, and the means of securing their observance. Compensation in damages.

Preventive and specific relief.

§ 1494. Specific and preventive relief may be given in certain specified cases, and in none others.

# TITLE II.

## COMPENSATORY RELIEF.

CHAPTER I. General principles.
II. Measure of damages.

## CHAPTER I.

### GENERAL PRINCIPLES.

ARTICLE I. Definition and general provisions.
II. Interest.
III. Exemplary damages.

## ARTICLE I.

### DEFINITION AND GENERAL PROVISIONS.

SECTION 1495. Right to damages.
1496. What injuries create the right to damages.
1497. Injuries resulting or probable after suit brought.
1498. Negligence.
1499. Partial breach.

Right to damages.

§ 1495. Whoever suffers loss or harm[1] by the unlawful act or omission of another, is entitled to have from him a compensation in money therefor; which is called Damages.

[1] Sedgwick on Damages, 31, 32; 22 *Verm.*, 231. The references to Sedgwick are according to the original paging.

What injuries create the right to damages.

§ 1496. In order to create a right to damages the loss or harm must be the direct and immediate [*or* proximate and natural[1]], consequence of the unlawful act or omission complained of, or such a consequence as was foreseen, or could be [*or* may reasonably be supposed to have been[2]] foreseen at the time of such unlawful act or omission, or, if the loss occurred through a breach of contract, then at the time of

making the contract;[2] but nothing in this section applies to contracts for the payment of money only.[3]

[1] Per MARCY, J., Armstrong v. Perry, 5 *Wend.*, 535, 538.
[2] Code of Louisiana, Arts. 1928, 2294, 2295.
[3] Sedgwick Dam., 112.

Injuries resulting or probable after suit brought.

§ 1497. Damages may be given for loss or harm which resulted after the commencement of the action or which certainly will result in the future; except that no damages can be awarded for the merely probable consequences of a breach of contract.

Sedgwick Dam., 104; Wilcox v. Ex'crs of Plummer, 4 *Peters*, 172, 182.

Partial breach.

§ 1498. No damages can be given for a mere part performance of an obligation under an entire contract, except as hereinafter provided in the Title on SPECIFIC RELIEF.

18 *Wend.*, 187; 5 *Denio*, 406, and cases cited.

## ARTICLE II.

### INTEREST AS DAMAGES.

SECTION 1499. Interest, where there is an agreement to pay it.
1500. Interest on default in contract.
1501. In actions other than on contract.
1502. Limit of rate by contract.

Interest where there is an agreement to pay it.

§ 1499. Interest is always properly chargeable as damages when there is either an express or an implied agreement to pay it.[1]

[1] Meech v. Smith, 7 *Wend.*, 315.

Interest on default in contract.

§ 1500. Where a debtor is in default for not paying money, delivering property or rendering services on or before a day certain, in pursuance of his contract, whether the value is liquidated or not, he is liable for interest thereon from such day.[1] Where a demand is necessary to put the debtor in default, except in the case of loans or advances of money, interest is to be given only from the demand.

[1] Van Rensselaer v. Jewett, 2 *N. Y.*, 141; Livingston v. Miller, 11 *N. Y.*, 80; Purdy v. Phillips, 11 *N. Y.*, 406; 1 *Duer*, 369.

In actions other than on contract.

§ 1501. In actions arising from causes other than contract,[1] and in all cases of oppression, fraud, or malice, interest may be given, in the discretion of the jury.[2]

[1] Sedgwick on Dam., 385, 386.

[2] Wilson *v.* Conine, 2 *Johns.*, 280; Bissel *v.* Hopkins, 4 *Cow.*, 53; Hyde *v.* Stone, 7 *Wend.*, 354; Baker *v.* Weller, 8 *Wend.*, 504; Dillerback *v.* Jerome, 7 *Cow.*, 294.

Limit of rate by contract.

§ 1502. On a contract to pay with interest, at a less rate than the lawful limit, the creditor, after a breach, is not entitled to the full lawful interest, except in case of fraud,[1] but the rate is governed by the contract, until it ceases by being merged in a new obligation.[2]

[1] Miller *v.* Burroughs, 4 *Johns. Ch.*, 436; Van Beuren *v.* Van Gaasbeck, 4 *Cow.*, 496.

[2] Lawrence *v.* Leake & Watts Orphan House, 2 *Den.*, 577.

## ARTICLE III.

### EXEMPLARY DAMAGES.

SECTION 1503. Exemplary damages, in what cases allowed.

Exemplary damages, in what cases allowed.

§ 1503. In all cases of oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give exemplary, or vindictive, damages,[1] for example's sake, and by way of punishing the defendant.[2]

[1] In this we have followed the doctrine established by the Court of Appeals (Hunt *v.* Bennett, 19 *N. Y.*, 173; and see Fry *v.* Bennett, 1 *Abb. Pr.*, 289; 4 *Duer*, 247; and cases. S. P., Cabel *v.* Denkin, 20 *Wend.*, 172; Brizsee *v.* Maybee, 21 *id.* 144); but, upon principle, there seems no reason why it should be preserved.

[2] Tillotson *v.* Cheatham, 3 *Johns.*, 56, 64.

## CHAPTER II.

### MEASURE OF DAMAGES.

SECTION 1504. General test of the measure of damages.
1505. Measure of damages in certain cases:
1. Breach of covenants of warranty and quiet enjoyment in grants of real property;
2. Seisin and right to convey;
3. Against incumbrances;
4. Covenant to convey land;
5. Covenant to buy land;
6. Warranty of personal property;
7. Breach of contract of sale of personal property by seller;
8. Breach of contract of sale of personal property by buyer;
9. Breach of carrier's contract;
10. Losses under policies of marine insurance;
11. Breach of promise of marriage;
12. Breach of obligation to pay liquidated sum;
13. Dishonor of bills of exchange;
14. Breaches of other contracts;
15. Wrongful occupation of real property;
16. Unlawful entries on land, &c.; erection of nuisances;
17. Forcible exclusion from possession of real property;
18. Injuries to trees, &c.;
19. Wrongful sale of a pledge;
20. Wrongful conversion of personal property;
21. Injuries to animals.
1506. Cases of fraud, oppression and malice.

General test of the measure of damages.

§ 1504. The measure of damages is, in general, that amount which will compensate for the injury suffered. But greater damages may be awarded, as provided in section 1503, whenever an unlawful act or omission, which has caused actual damage, is accompanied by oppression, fraud or malice, actual or presumed; and in cases of seduction or breach of promise of marriage. And where an unlawful act or omission has caused no loss to the plaintiff, he may yet have nominal damages.

Measure of damages in certain cases.

§ 1505. In the following cases, the measure of damages is as follows:

Breach of covenant of warranty

1. For breach of covenants of warranty and of quiet enjoyment in conveyances of real property, the value of

and quiet enjoyment in grants of real property.

the property at the time of the conveyance,[1] with interest thereon for such time as the grantee has derived no benefit from the property,[2] and his expenses in defending the possession. When the eviction is from only a part of the premises the rule is the same, substituting for the value of the whole the value of such part at the time of the conveyance, taken in proportion to the value of the whole.[3]

[1] Sedgwick Dam., 159; Staats v. Ten Eyck's Exrs., 3 *Caines*, 111.

[2] Sedgwick Dam., 159; Baxter v. Ryerss, 13 *Barb.*, 267.

[3] Bingham v. Weiderwax, 1 *N. Y.*, 509.

Seisin and right to convey.

2. For breach of covenants of seisin and right to convey the consideration paid with interest during such time as the grantee derived no benefit from the property.[1]

[1] Sedgwick Dam., 175, 177.

Against incumbrances.

3. For breach of covenants against incumbrances, the sum actually expended by the grantee in extinguishing the same;[1] or when the incumbrances are still outstanding, [and not in the grantee's power to extinguish them] then the annual interest on the purchase money during the continuance of such incumbrance.[2]

[1] Sedgwick Dam., 178; Delavergne v. Norris, 7 *Johns.*, 358; but see 10 *Wend.*, 142.

[2] Rickett v. Snyder, 9 *Wend.*, 423.

Covenant to convey land.

4. For a breach of covenant to convey, in the absence of bad faith, the purchase money paid;[1] but adding thereto, in case of fraud, the damages arising from the loss of the bargain.[2]

[1] Sedgwick Dam., 186. See Conger v. Weaver, 20 *N. Y.*, 140.

[2] Trull v. Granger, 8 *N. Y.*, 115; Brinkerhoff v. Phelps, 24 *Barb.*, 100; Sedgwick, 210.

Covenant to buy land.

5. For a breach of a covenant to buy land, the agreed price with interest.[1]

[1] Franchot v. Leach, 5 *Cow.*, 506; Richards v. Edick, 17 *Barb.*, 260.

Warranty of personal property.

6. For a breach of warranty of personal property sold, the difference in value of the property as it is and as it was warranted to be.[1]

[1] Tallman v. Clute, 3 *Barb.*, 424; Cary v. Gruman, 4 *Hill*, 625; Comstock v. Hutchinson, 10 *Barb.*, 211; Roberts v. Carter, 28 *Barb.*, 462; Milburn v. Belloni, 12 *Abb. Pr.*, 451. This rule may need some qualification, as it scarcely does justice in cases where an article is warranted fit for a particular purpose.

7. For a breach of contract of sale of personal property by the seller, the difference between the contract price and the market value at the time and place,[1] when and where it should have been delivered,[2] with interest on that difference;[3] but if the buyer has paid the purchase money in advance, then the highest market price at any time [between the agreed time of delivery] and the settlement of the question[4] [at the place of delivery.]

**Breach of contract of sale of personal property by seller.**

[1] Gregory *v.* McDowell, 8 *Wend.*, 485.
Sedgwick Dam., 260, 265; but see Suydam *v.* Jenkins, 3 *Sandf.*, 614; Burden *v.* Nicolai, 4 *E. D. Smith*, 14.
[2] Dana *v.* Fiedler, 12 *N. Y.*, 41.
[4] Sedgwick Dam., 261, 264, 265.

8. For the like breach by the buyer, the price named in the contract, if the property has been delivered,[1] or has not been resold by the seller;[2] if resold, then the difference between the price agreed and the price obtained at such resale.[3]

**Breach of contract of sale of personal property by buyer.**

[1] Sedgwick Dam., 280.
[2] Hall *v.* Bigelow, 20 *Barb.*, 21; Bement *v.* Smith, 15 *Wend.*, 493.
[3] Bement *v.* Smith, 15 *Wend.*, 493.

9. For a breach of a carrier's contract to deliver personal property, the market[1] value thereof at the place [and on the day] agreed upon for delivery,[2] with interest from that day, deducting freight and other expenses of transportation;[3]

**Breach of carrier's contract.**

[1] Smith *v.* Griffith, 3 *Hill*, 333; Kent *v.* H. R. R. R. Co., 22 *Barb.*, 278.
[2] Sedgwick on Damages, 365; Sherman *v.* Wells, 28 *Barb.*, 403.
[3] Sherman *v.* Wells, 28 *Barb.*, 403; Atkisson *v.* Steamboat Castle Garden, 28 *Mis.*, 124.

10. For losses, under policies of marine insurance, when the loss is partial, the actual cost of repair, deducting one-third as provided in the chapter on Marine Insurance. In total losses the value is ascertained by deducting from the value, at the time of sailing, one-fifth; and the freight money must contribute on one-half, and be contributed for on the whole.

**Losses under policies of marine insurance.**

Leavenworth *v.* Delafield, 1 *Caines*, 573. But see Mutual Safety Ins. Co. *v.* The George, 8 *Law Rep.*, 361.

Breach of promise of marriage.

11. For a breach of a promise of marriage the damages rest in the sound discretion of the jury, under the circumstances of each case.

Pitcher v. Livingston, 4 *Johns.*, 1, 12; Denmick v. Lockwood, 10 *Wend.*, 142, 155.

Breach of promise to pay liquidated sum.

12. For a breach of an obligation to pay money only, the amount due with lawful interest,[1] subject, however, to the provisions of section 623 of this Code;

[1] Sedgw. on Dam., 236; Code La., 1929.

Dishonor of bills of exchange.

13. For dishonor of foreign bills of exchange, such damages as are prescribed by sections 1340 to 1343, inclusive.

Breaches of other contracts.

14. For breaches of other contracts the measure of damages depends on the terms of the contract itself, whenever it is possible to apply them as a basis of calculation. But whenever the contract plainly appears to be unconscionable in its terms, it does not give the measure of damages.

Russell v. Roberts, 3 *E. D. Smith*, 318. See James v. Morgan, 2 Levinz. 111.

Wrongful occupation of real property.

15. For the wrongful occupation of real property, the mesne profits, or annual value[1] of the property for not exceeding six years next preceding the commencement of the action or proceeding to enforce the right to damages,[2] with interest from the times at which such profits respectively accrued,[3] and the cost, if any, of recovering the possession.[4] [But this provision does not apply to cases of dower.[5]]

[1] Sedgw. on D., 125.

[2] 2 Rev. Stat., 311, § 50; Jackson v. Wood, 24 *Wend.*, 443. It may be thought better to omit this special limitation, and leave the general limitation of actions to apply.

[3] See Jackson v. Wood, *supra.*

[4] 2 *Burr.*, 665.

[5] The abolition of dower in future is proposed in the Second Division of this Code. This provision will leave damages in such cases to the existing statutes.

Unlawful entries on land, &c., erection of nuisances.

16. For unlawful entries on land, or interference with the enjoyment thereof, and for the erection or continuance of nuisances, the amount of loss or harm directly resulting from the act complained of.

Walter v. Post, 4 *Abb. Pr.*, 382.

17. For forcibly ejecting or excluding a person from the possession of real property, three times the actual damages.[1]

Forcible exclusion from possession of real property.

[1] 2 R. S., 338, § 4.

18. For wrongful injuries to trees, timber or underwood upon the land of another, or removal thereof, three times the actual damages, except where the trespass was casual and involuntary, or committed under the belief that the land belonged to the trespasser, or where the wood was taken by the authority of the highway officers for the purposes of the highways; in which cases the damages are the actual loss or harm.[1]

Injuries to trees, &c.

[1] 2 R. S., 338, §§ 1-3.

19. For the wrongful sale of a pledge, the value of the thing pledged at the time of the application to redeem.[1]

Wrongful sale of a pledge.

[1] Cortelyou v. Lansing, 2 *Cai. Cas.*, 200.

20. For the wrongful taking and conversion of personal property other than things in action, the highest market value of the property between the conversion and the trial,[1] with a fair compensation for time lost and expenses incurred in the pursuit of the property.[2] But in actions arising upon a lien, the damages cannot exceed the amount of the lien.[3]

Wrongful conversion of personal property.

[1] Sedgwick on Damages, 479, and cases; Wilson v. Matthews, 24 *Barb.*, 295.

[2] Bennett v. Lockwood, 20 *Wend.*, 223.

[3] Spoor v. Holland, 8 *Wend.*, 445.

21. For injuries to animals, committed wilfully, or by gross negligence, in disregard of humanity, exemplary damages may be given.

Injuries to animals.

§ 1506. The damages prescribed by the last section do not include the exemplary damages which may be given in cases of fraud, oppression or malice, actual or presumed, except as therein expressly provided.

Cases of fraud, oppression and malice.

# TITLE III.

## SPECIFIC AND PREVENTIVE RELIEF.

CHAPTER I. General Principles.
II. Specific Relief.
III. Preventive Relief.
IV. Mixed and General Relief.

## CHAPTER I.

### GENERAL PRINCIPLES.

SECTION 1507. Specific and preventive relief distinguished.
1508. In what cases allowed.

Specific and preventive relief distinguished.

§ 1507. In certain cases, where a thing claimed can be taken and delivered to the claimant, or where compensation in damages for a loss by the unlawful act or omission of another would not satisfy the ends of justice, relief may be had of a more specific and immediate nature. Such relief may be given in three modes:

1. By taking possession of the thing and delivering it to the claimant;

2. By requiring the party to do that which ought to be done; and,

3. By preventing the party from doing that which ought not to be done.

Each of the first two modes is called Specific, and the third Preventive Relief.

In what cases allowed.

§ 1508. Whenever an inequitable loss or harm would otherwise fall upon a person, from circumstances beyond his own control, or from his own acts done in entire good faith and in the performance of a supposed duty, without

culpable negligence, he may be relieved, by the tribunals, in such manner as may be most just to all parties concerned.

Story Eq. Jurisp., § 89.

## CHAPTER II.

### SPECIFIC RELIEF.

ARTICLE I. Possession of real property.
II. Possession of personal property.
III. Specific performance of contracts.
IV. Revision of contracts.
V. Rescission of contracts.

## ARTICLE I.

### POSSESSION OF REAL PROPERTY.

SECTION 1509. Immediate possession.
1510. Cloud on title, &c.

Immediate possession.

§ 1509. When one claiming specific real property is entitled to the immediate possession thereof, he may have the same taken and delivered to him as provided by the CODE OF CIVIL PROCEDURE.

Cloud on title, &c.

§ 1510. When one claiming real property, or an interest therein, is not entitled to the immediate possession thereof, because another is in possession under a title acquired by fraud or mistake, or on which by reason of a fiduciary relation or for some other reason it is inequitable to rely, or when one being in possession seeks to remove a cloud upon his title, the court may require the party in possession and any other person to do that which ought to be done for the protection of the claimant's rights.

## ARTICLE II.

### POSSESSION OF PERSONAL PROPERTY.

SECTION 1511. Judgment for possession.
1512. Peculiar relief in certain cases.
1513. Damages, when inadequate.

Judgment for possession.

§ 1511. When one claiming specific personal property is entitled to the immediate possession thereof, he may have the same taken and delivered to him as provided by the CODE OF CIVIL PROCEDURE.

Peculiar relief in certain cases.

§ 1512. Where one claiming personal property or an interest therein, is not entitled to the immediate possession thereof, or the remedy mentioned in the last section would for any reason be imperfect, and compensation in damages for the detention or conversion of the property would be inadequate,[1] or where the actual possessor has obtained possession through an abuse of power by some person standing in a fiduciary relation to the injured party,[2] the court will require the party in possession and any other person to transfer the property, and do such other things as ought to be done for the protection of the claimant's right.

[1] Story Eq. J., § 709; Fells *v.* Read, 3 *Ves., Jr.*, 70; Walwyn *v.* Lee, 9 *Ves.*, 33; Somerset *v.* Cookson, 3 *P. Wms.*, 390; Pusey *v.* Pusey, 1 *Vernon*, 273.

[2] Wood *v.* Rowcliffe, 2 *Phillips Ch.*, 382; S. C., 3 *Hare*, 304.

Damages, when inadequate.

§ 1513. Compensation in damages is deemed inadequate for the purposes of the last section in case of the detention of any of the following articles:

1. Family relics, ornaments[1] or heirlooms,[2] such as ancient gems, medals, coins, statues, busts, paintings, portraits and the like;[3]

2. Curious antiquities and other curiosities;[4]

3. Works of art by old or distinguished artists;[5]

4. Deeds,[6] muniments of title,[7] account books,[8] and other papers of peculiar value;

5. All other personal property having a peculiar value and importance to the owner, so that its loss cannot be compensated in damages;[8]

6. In every case where there is danger of irreparable mischief to the owner, unless he can have the custody of the thing.[10]

[1] Saville v. Tankred, 1 *Ves.*, 101.
[2] Macclesfield v. Davis, 3 *Ves. & B.*, 16–18.
[3] Arundel v. Phillips, 10 *Ves.*, 140, 148; Story Eq. Juris, § 710.
[4] Somerset v. Cookson, 3 *P. Wms.*, 390.
[5] Lowther v. Lowther, 13 *Ves.*, 95.
[6] Jackson v. Butler, 2 *Atk.*, 306.
[7] Pusey v. Pusey, 1 *Vern.*, 273.
[8] Lingan v. Simpson, 1 *Sim. & Stu.*, 600.
[9] Fells v. Read, 3 *Vesey, Jr.*, 70; Lloyd v. Loaring, 6 *Ve.*, 773, 779.
[10] Somerset v. Cookson, 3 *P. Wms.*, 390.

## ARTICLE III.

### SPECIFIC PERFORMANCE OF CONTRACTS.

SECTION 1514. In general.
1515. Specific performance must be a mutual right.
1516. Contract in writing.
1517. Agreement for arbitration. Award.
1518. When specific performance cannot be had.
1519. Effect of mistake.
1520. Contract for sale of land.
1521. Reformation and specific performance.
1522. Contract for sale of personal property.
1523. Informal contracts.

In general.

§ 1514. A party to a contract which the other party refuses to perform may, in certain cases, have a specific performance of the contract adjudged; but only when the contract is such that the remedy in damages for its violation would be insufficient or doubtful in its nature, extent, operation, or adequacy;[1] or the damages themselves are doubtful and uncertain in their amount;[2] or where there is a reasonable fear of great and irreparable damage from such violation.[3]

[1] Story Eq. Jur., §§ 718, 728; Wood v. Rowcliffe, 3 *Hare*, 304; Phillips v. Berger, 2 *Barb.*, 609; S. C., 8 *Barb.*, 527; Stuyvesant v. Mayor of New York, 11 *Paige*, 414.
[2] Story Eq. Jur., § 728.
[3] McKnight v. Roberts, 1 *Halstead Ch.*, 229, 642.

§ 1515. Specific performance cannot be adjudged in favor of one party to a contract, unless the other, acting in good faith, would also be entitled thereto.

Special performance must be a mutual right.

Story Eq. Jur., § 723; Flight *v.* Bolland, 4 *Russ.*, 298; Phillips *v.* Berger, 8 *Barb.*, 528; Benedict *v.* Lynch, 1 *Johns. Ch.*, 376.

§ 1516. When the contract of which specific performance is sought is expressed in writing, it is no objection to adjudging performance that the contract is not subscribed by the party seeking performance.[1] Nor is the form of the instrument, by which the contract appears, material.[2]

Contract in writing.

[1] Story Eq. Jur., § 736 *a*; Woodward *v.* Harris, 3 *Sandf.*, 272; *In re* Hunter, 1 *Edw. Ch.*, 1; Clason *v.* Bailey, 14 *Johns.*, 484; McCrea *v.* Purmort, 16 *Wend.*, 460.

[2] Story Eq. Jur., § 751.

§ 1517. Specific performance cannot be adjudged of an agreement to submit a controversy to the determination of any person;[1] but an existing award made under such a submission may be adjudged to be specifically performed.[2]

Agreement for arbitration.

Award.

[1] Story Eq. Jur., § 1457, and cases.

[2] Bouck *v.* Wilber, 4 *Johns. Ch.*, 405.

§ 1518. Specific performance cannot be adjudged:

When specific performance cannot be had.

1. When the contract embodies a hard and unconscionable bargain;[1]

2. When the performance has become impossible; but this is no objection if the contract can be performed with a small and not material variance;[2]

3. When the contract is against public policy,[3] immoral,[4] illegal,[4] or involves a breach of trust.[5]

[1] Gasgal *v.* Small, 2 *Strobh. Eq.*, 72; Story Eq. Jur., § 769.

[2] King *v.* Bardeau, 6 *Johns. Ch.*, 38; Wynne *v.* Reynolds, 6 *Paige*, 407.

[3] Story Eq. Jur., §§ 274, 294.

[4] Story Eq. Jur., §§ 274, 296.

[5] Story Eq. Jur., § 787.

4. When the contract is founded in fraud, imposition, mistake, undue advantage, or gross misapprehension, or when from a change of circumstances it would be unconscientious to enforce it.[1] But in case of a mistake, if the

contract itself provides for compensation in case of mistake, a specific performance may be adjudged;[2]

5. When the contract is not for a valuable or meritorious consideration;[3]

6. When the parties to the contract, or any of them, are incompetent to contract;[4]

7. When the party asking such relief is, himself, at fault in not performing, fully and fairly, all his obligations to the other.[5] But such specific performance may be ordered, if the incomplete performance by the former is without fault on his part, and he cannot be placed in the same condition as if there had been no contract.[6] A default merely in the time of the performance does not preclude him from relief unless the time is expressed in the contract to be of the essence of such contract.[7]

[1] Story Eq. Jur., § 750 *a*; Best *v.* Stowe, 2 *Sandf. Ch.*, 298.
[2] Story Eq. Jur., § 787. This may need some qualification.
[3] Woodcock *v.* Bennet, 1 *Cow.*, 711.
[4] Flight *v.* Bolland, 4 *Russ.*, 298; Story Eq. Jur., § 787.
[5] Story Eq. Jur., § 736; Smith *v.* Fremont, 2 *Stewart*, 330.
[6] Story Eq. Jur., §§ 771–775; Wynne *v.* Reynolds, 6 *Paige*, 407.
[7] Baldwin *v.* Salter, 8 *Paige*, 473.

Effect of mistake.

§ 1519. In all contracts for the sale of real property, a mistake in description, or a defect in title, quality, or quantity, if capable of a complete compensation, and not material, does not take away the right to a specific performance thereof.[1] If such mistake or defect is substantial, specific performance cannot be adjudged[2] against the party prejudiced thereby; but it may be adjudged on his application[3] upon a proportionate abatement of the consideration.[4]

[1] Story Eq. Jur., § 777; King *v.* Bardoe, 6 *Johns. Ch.*, 38; Dyer *v.* Hargrave, 10 *Vesey*, 505; 1 *Ves., Jr.*, 221.
[2] Story Eq. Jur., § 778.
[3] King *v.* Wilson, 6 *Beav.*, 124.
[4] Story Eq. Jur., § 779.

Contract for sale of land.

§ 1520. Whenever any person, having contracted in writing to sell his real property to another, sells and conveys it to a third person having notice of the contract, the latter may be adjudged specifically to perform the contract of the seller;[1] and whenever a specific performance of a contract

concerning real property would be adjudged between the parties to it, it may likewise be adjudged between all persons claiming under them in privity of estate, or of representation, or of title; unless other controlling equities interpose.[2]

[1] Story Eq. Jur., § 784; Champion *v.* Brown, 6 *Johns. Ch.*, 398, 402.

[2] Story Eq. Jur., § 788; Champion *v.* Brown, *supra.*

Reformation and specific performance.

§ 1521. Specific performance may be adjudged of a contract which the court is called upon first to reform, and then to cause to be specifically performed.

Gillespie *v.* Moon, 2 *Johns. Ch.*, 585; Keisselbrack *v.* Livingston, 4 *id.*, 144; Bouck *v.* Wilber, *id.*, 405.

Contract for sale of personal property.

§ 1522. Subject to the general provisions of this article, an agreement to sell personal property may be adjudged to be specifically performed whenever the property is so rare, or curious,[1] that damages would not be a sufficient compensation, or whenever the value of the same is difficult or impossible to be determined.[2]

[1] Falcke *v.* Gray, 5 *Jur.* [*N. S.*], 645, (KINDERSLEY, V. C.)

[2] Strong Eq. Jur., § 719, and cases cited. Wood *v.* Rowcliffe, 3 *Hare*, 304.

Informal contracts.

§ 1523. The specific performance of contracts declared void by the provisions of this Code, for want of writing, seal, or other formalities, may be adjudged in the following cases only:

1. When the contract is fully set forth in the pleading of the party seeking the relief, and admitted by the pleading of the other, and the latter does not set up its invalidity;[1]

2. When the contract has been in part performed,[2] and the possession of real property solely by virtue of a contract of sale is to be considered such part performance;[3]

3. Whenever the contract should have been in writing, but the party resisting performance prevented it by his fraud from being put in writing.[4]

[1] Story Eq. Jur., §§ 755, 756; Att'y Gen'l *v.* Sitwell, 1 *Younge & Coll.*, 583.

[2] Rathbun *v.* Rathbun, 6 *Barb.*, 98.

[3] Story Eq. Jur., § 763.

[4] Story Eq. Jur., § 768; Newland on Contr., pp. 179–197.

## ARTICLE IV.

### REVISION OF CONTRACTS.

SECTION 1524. Revision to conform to the intent of the parties.
1525. Revision to conform to original agreement.
1526. Presumption as to intent of parties.
1527. Revision of writings.
1528. Relief from effects of non-performance.
1529. To whom relief may be granted.

Revision to conform to the intent of the parties.

§ 1524. Whenever a contract is the result of fraud, accident or mistake, as defined by the title on CONTRACTS, the court may amend, add to, qualify, or vary it so as to make it just, reasonable and fit to be enforced.[1] And a contract cannot be revised when thereby the rights of any third person would be injuriously affected.[2]

[1] Story Eq. Jur., § 694.
[2] Story Eq. Jur., § 139.

Revision to conform to original agreement.

§ 1525. Where an instrument executed is intended to embody an agreement previously entered into, but the instrument, by mistake of the draftsman either as to law or fact, does not fulfil the intention of the parties, the court may revise the instrument so as to make it conform to the intention of the parties.

Hunt *v.* Rousmaniere, 2 *Mass.*, 342; 8 *Wheat.*, 174; 3 *Mass.*, 294; 1 *Pet.*, 1.

Presumption as to intent of parties.

§ 1526. For the purposes of the revision of contracts, it must be presumed that all the parties to any contract intended to make an equitable and conscientious agreement.

Sto. Eq. Jur., § 162; Demarest *v.* Wynkoop, 3 *Johns. Ch.*, 129.

Revision of writings.

§ 1527. In revising written instruments, the court cannot inquire what the instruments were intended to mean, or what were intended to be their legal consequences; but must confine itself to the inquiry what the instruments were intended to be.

Story Eq., § 168; Adams' Eq., 170, Leavitt *v.* Palmer, 3 *N. Y.*, 19.

Relief from effects of non-performance.

§ 1528. Whenever, under the terms of a contract, a loss to one party would occur on his failure to perform, to the

exact letter, his part of such contract, and he is prevented, by accident, mistake, illness, or the fraud of the other party, from so performing it, he may be relieved from such loss on offering to the other party a full indemnity, unless such relief would violate an equal or stronger equity of such other party.

Skinner *v.* Dayton, 2 *Johns. Ch.*, 526; De Forest *v.* Bates, 1 *Edw. Ch.*, 394; Skinner *v.* White, 17 *Johns.*, 357; Story Eq. Jur., § 89.

To whom relief may be granted.

§ 1529. Whenever relief would be granted as between the original parties to a contract in writing, the same relief may be granted as between those claiming under them,[1] except as against purchasers in good faith and without notice.[2]

[1] Story Eq. Jur., § 165.
[2] Walwyn *v.* Lee, 9 *Ves.*, 33.

## ARTICLE V.

### RESCISSION OF CONTRACTS.

SECTION 1530. When rescission may be adjudged.
1531. Rescission for mistake.
1532. Court may require party rescinding to do equity.
1533. Cloud on title.
1534. Instrument incompletely executed.

When rescission may be adjudged.

§ 1530. The rescission of a contract may be adjudged whenever, by any provision of law, it is:

1. Void, for causes not appearing in the instrument itself, and the instrument itself is presumptive evidence against the existence of such causes or obstructs the party in the exercise of some right;

2. Voidable, by the party seeking such relief;

3. When the subject of the contract has no existence;[1]

4. When, in the case of a transfer, or an agreement for a transfer or lien, there is a total failure of title;[2]

5. When the contract is in fraud of the rights of the person seeking the relief, though he was not a party thereto; or tends to violate private or public confidence, or to impair the public interests.

[1] Story Eq. Jur., §§ 143, 144.
[2] Id., § 141.

Rescission for mistake.

§ 1531. Rescission cannot be adjudged for mere mistake, unless the parties can be restored to their position as if the contract had not been made,[1] nor for any mistake which was not mutual, unless it was the result of fraud.[2]

[1] Skinner v. White, 17 *Johns.*, 357.
[2] Story Eq. Jur., § 141.

Court may require party rescinding to do equity

§ 1532. On adjudging the rescission of a contract, except for usury[1], the court may require the party to whom such relief is granted to make any compensation to the other which justice may require.

[1] See § 781.

Cloud on title.

§ 1533. Any instrument in writing affecting property or personal rights, whether a contract or otherwise, which is void for causes which do not appear in the instrument, and when the instrument is presumptive evidence against the existence of such causes, may be adjudged void and ordered to be delivered up or canceled, on the application of the party injured thereby.[1]

[1] Hamilton v. Cummings, 1 *Johns. Ch.*, 520–524; Van Dorn v. Mayor, &c., 9 *Paige*, 388; Cox v. Clift, 2 *N. Y.*, 123; Field v. Holbrook, 6 *Duer*, 597.

Instrument incompletely executed.

§ 1534. In case of the incomplete execution of an instrument, whether by the neglect to execute it of some of the parties who were intended to be bound thereby, or otherwise, those who have executed it may have it adjudged void and ordered to be canceled if upon its face it could bind them.

Story Eq. Jur., § 169 *a*.

## CHAPTER III.

### PREVENTIVE RELIEF.

SECTION 1535. Preventive relief, what.
1536. Injunction, when granted.
1537. Injunction, when not granted.

Preventive relief, what.

§ 1535. Preventive relief is the interference of the law in civil matters, to prevent the doing of that which ought not to be done. It is granted by injunction provisional or final.

Dederick v. Hoysradt, 4 *How. Pr.*, 350.

Injunction, when granted.

§ 1536. An injunction may be granted to prevent the doing of anything inequitable and hurtful, whenever the injury therefrom would be irreparable, or compensation in damages would for any reason be inadequate;[1] to avoid a multiplicity of actions by or against the plaintiff;[2] to prevent the doing of anything which would be a fraud upon,[3] or detrimental to,[4] the public or any class or body thereof; to restrain the wrongful acts of public officers and servants to the detriment of individuals, when the written proceedings on which such acts are founded are not void on their face,[5] and to secure to the persons entitled thereto any statute privilege or franchise;[6] to restrain nuisances; and to prevent the unlawful use of trade-marks.

[1] Nuisance is intended to be covered by this and the next.

[2] To include all proceedings in the nature of the old bills of peace, &c.

[3] Trade-marks, signs, &c., &c.; Hogg *v.* Kirby, 8 *Ves.*, 215; Ld. Byron *v.* Johnston, 2 *Meriv.*, 29; Keene *v.* Harris, cit. 17 *Ves.*, 342; Coats *v.* Holbrook, 2 *Sandf. Ch.*, 586; Snowden *v.* Noah, *Hop.*, 347; Bell *v.* Locke, 8 *Paige*, 75; Howard *v.* Henriques, 3 *Sandf.*, 725; Amoskeag M'g Co. *v.* Spear, 2 *id.*, 599; Gillot *v.* Kettle, 3 *Duer*, 624.

[4] Acts of public officers and corporations concerning public interests. De Baum *v.* Mayor, 16 *Barb.*, 392; Att'y-Gen. *v.* Cohoes Co., 6 *Paige*, 133; People *v.* Sturtevant, 9 *N. Y.*, 563; Davis *v.* Mayor, 1 *Duer*, 451; Milthan *v.* Sharp, 17 *Barb.*, 435.

[5] Heywood *v.* Buffalo, 14 *N. Y.*, 534.

[6] Croton Turnpike *v.* Ryder, 1 *Johns. Ch.*, 611; Thompson *v.* N. Y. & Harlem R. R., 3 *Sandf. Ch.*, 625.

Injunction, when not granted.

§ 1537. No injunction can in any case be granted for the purpose of protecting a right merely nominal;[1] nor against persons not parties to the action;[2] nor where the filing of a notice of action pending would be a sufficient protection;[3] nor to restrain the violation of any penal law, or of any ordinance of a municipal corporation, not amounting to a nuisance;[4] nor to restrain the violation of any patent[5] or copyright granted by the United States; nor to restrain the violation of any agreement of which, from the nature of the subject, specific performance would not be adjudged;[6] nor to protect any doubtful right,[7] except in urgent cases, where delay would be ruinous;[8] nor to prevent the execution of any statute of this state, nor the exercise of any

public office; nor in any case when the damage caused by such injunction would be greater than any damage which could occur from not granting it.[8]

[1] Wetmore *v.* Story, 3 *Abb. Pr.*, 262.

[2] Fellows *v.* Fellows, 4 *Johns. Ch.*, 25; Chase *v.* Chase, 1 *Paige*, 198; Waller *v.* Harris, 7 *id.*, 167.

[3] Waddell *v.* Brune, 4 *Edw.*, 671; Osborn *v.* Taylor, 5 *Paige*, 515.

[4] Mayor of Hudson *v.* Thorne, 7 *Paige*, 261; Brandreth *v.* Lance, 8 *id.*, 24.

[5] Parsons *v.* Barnard, 7 *Johns.*, 144.

[6] Eden on Inj., 224; Newbery *v.* James, 2 *Meriv.*, 446; Williams *v.* Williams, 3 *id.*, 160.

[7] Snowden *v.* Noah, *Hopk.*, 347; Steamboat Co. *v.* Livingston, 3 *Cow.*, 713.

Kerlin *v.* West, 3 *Green* (*N. J.*), 448.

Gallatin *v.* Oriental Bank, 16 *How. Pr.*, 253; Grey *v.* Northumberland, 17 *Ves.*, 281.

# PART II.

## DEBTOR AND CREDITOR.

TITLE I. General Principles.
II. Instruments and Transfers in Fraud of Creditors.
III. Assignments for Benefit of Creditors.

## TITLE I.

### GENERAL PRINCIPLES.

SECTION 1538. Who is a debtor.
1539. Who is a creditor.
1540. Contracts of debtor are valid.
1541. Payments in preference.
1542. Relative rights of different creditors.

Who is a debtor.

§ 1538. A debtor within the meaning of this title is one who by reason of a judgment or a contract, express or implied, is or may become liable to pay money to another, whether such liability be certain or contingent.

Elwood *v.* Diefendorf, 5 *Barb.*, 398.

Who is a creditor.

§ 1539. A creditor is one in whose favor such obligation exists.

Compare Thompson *v.* Van Vechten, 5 *Abbotts' Pr.*, 458; Westcott *v.* Gunn, 4 *Duer*, 107.

Contracts of debtor are valid.

§ 1540. In the absence of fraud, any contract of a debtor is valid as against all his creditors, existing or subsequent, who have not acquired a lien on the property affected by such contract.

Miller *v.* Lewis, 4 *N. Y.*, 554; Candee *v.* Lord, 2 *id.*, 269.

§ 1541. A debtor may pay or secure one creditor in preference to another.

Relative rights of different creditors.

§ 1542. Where one creditor is entitled to resort to each[1] of several sources for obtaining satisfaction, and another creditor is entitled to resort to some but not all of them, the latter may require the former to seek satisfaction from those to which the latter has no such title,[2] so far as it can be done without impairing his right to complete satisfaction,[3] and without prejudice to the rights of third persons.[4]

[1] Farmers' Loan & Trust Co. v. Walworth, 1 *N. Y.*, 433.
[2] Beeley v. Lawrence, 11 *Paige*, 581; Hawley v. Mancius, 7 *Johns. Ch.*, 174.
[3] Everton v. Booth, 19 *Johns.*, 486; York & Jersey Steamboat Co. v. Jersey Co., *Hopk.*, 460.
[4] Reynolds v. Tooker, 18 Wend., 591; Dorr v. Shaw, 4 *Johns. Ch.*, 17.
See § 1459.

# TITLE II.

## FRAUDULENT INSTRUMENTS AND TRANSFERS.

SECTION 1543. Transfers, &c., with intent to defraud creditors.
1544. When void as to debtor, &c.
1545. Delivery and possession necessary to transfers of personal property.
1546. Rights of purchasers and mortgagees.
1547. Creditor's right must be judicially ascertained.
1548. Question of fraud, how determined.

Transfers, &c., with intent to defraud creditors.

§ 1543. Every assignment or other transfer of property, except wills, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud creditors, or others, of their demands, is void,[1] as against such creditors[2] and their successors in interest,[3] and as against any persons on whom the estate of the debtor devolves in trust for the benefit of others than the debtor.[4]

[1] 2 R. S., 137, § 1.
[2] Mosely v. Mosely, 15 *N. Y.*, 334.
[3] 1 R. S., 137, § 3.
[4] Laws of 1858, ch. 314.

When void as to debtor, &c.

§ 1544. The last section is not to prevent the debtor, and all claiming under him, from avoiding the same instruments and proceedings:

1. When obtained from the debtor by duress, menace, fraud, or undue influence exercised upon him;[1]

2. When the same, or any part thereof, remains unexecuted.[2]

[1] Where the transfer was obtained by an attorney, it was held void as to the grantor, his client, (Ford *v.* Harrington, 16 *N. Y.*, 285); and the above section is intended to declare the principle on which this qualification chiefly turns.

[2] Nellis *v.* Clark, 4 *Hill*, 424; 20 *Wend.*, 24; Mosely *v.* Mosely, 15 *N. Y.*, 334.

Delivery and possession necessary to transfers of personal property.

§ 1545. Every transfer of personal property in the possession and under the control of the person making the same, except transfers of things in action,[1] and of shipping and freight abroad,[2] which is not accompanied by an immediate delivery and followed by actual and continued change of possession of the things transferred, is presumptively fraudulent and void, as against those who are creditors of the person making the transfer while he remains in possession, and the successors in interest of such creditors, and as against any persons on whom the estate of the debtor devolves in trust for the benefit of others than the debtor,[4] and as against purchasers or incumbrancers[5] in good faith subsequent to the transfer. The presumption is conclusive unless he who claims under such transfer shows [*or* the presumption may be repelled by showing][6] that it was made in good faith and without intent to defraud.[7]

[1] Browning *v.* Hart, 6 *Barb.*, 91.

[2] 2 R. S., 137, § 7.

[3] 2 R. S., 137, § 3.

[4] Laws of 1858, ch. 314.

[5] Bennett *v.* Earll, 21 *Wend.*, 117; Baskins *v.* Shannon, 3 *N. Y.*, 310.

[6] See Hall *v.* Tuttle, 8 *Wend.*, 375; Brown *v.* Wilmerding, 5 *Duer*, 220; Clute *v.* Fitch, 25 *Barb.*, 428.

[7] 2 R. S., 136, § 5.

Rights of purchasers and mortgagees.

§ 1546. The provisions of this title do not affect the title of a purchaser for value,[1] or a mortgagee in good faith,[2] without notice of the fraudulent intent of his immediate grantor or mortgagor, or of the fraud rendering void the title of such grantor or mortgagor.

[1] 1 Rev. Stat., 137, § 5.

[2] Hall *v.* Arnold, 15 *Barb.*, 599; and see Baskins *v.* Shannon, 3 *N. Y.*, 310.

Creditor's right must be judicially ascertained.

§ 1547. A creditor can avoid his debtor's act or obligation, for fraud, only where the fraud obstructs the enforcement, by legal process, of his right to take the property affected by the transfer or obligation.

[1] Andrews v. Durant, 18 *N. Y.*, 496; Reubens v. Joel, 13 *id.*, 488; Bishop v. Halsey, 3 *Abb. Pr.*, 400; Frisby v. Thayer, 25 *Wend.*, 396; Thompson v. Van Vechten, 5 *Abb. Pr.*, 458.

Question of fraud, how determined

§ 1548. The question of fraudulent intent in all cases arising under this title is a question of fact, and not of law; nor can any conveyance or charge be adjudged fraudulent as against creditors or purchasers solely on the ground that it was not founded on a valuable consideration.

2 R. S., 137, § 4.

# TITLE III.

## ASSIGNMENTS FOR BENEFIT OF CREDITORS.

SECTION 1549. Power to make assignments.
1550. Insolvency defined.
1551. What debts may be secured.
1552. Preferences.
1553. Joint and separate debts.
1554. Coercion not allowed.
1555. The instrument of assignment.
1556. Assignee takes subject to rights of third parties.
1557. Inventory required.
1558. Verification of inventory.
1559. Omission from inventory.
1560. Property exempt.
1561. Recording assignment and filing inventory.
1562. Effect of omitting to record.
1563. Assignment of real property.
1564. Bond of assignees.
1565. Accountings.
1566. Appeal.
1567. Prosecution of bond.
1568. Compensation.
1569. Assignees protected for acts done in good faith.
1570. What judge has jurisdiction.

Power to make assignments.

§ 1549. An insolvent debtor may, in good faith, execute an assignment of all his property to one or more assignees, in trust for the satisfaction of all his creditors. But such

an assignment is subject to the provisions of the Code relative to trusts and to fraudulent transfers, and to the restrictions imposed by law upon assignments by special partnerships[1] or by corporations.[2]

[1] 1 Rev. Stat., 776, §§ 20, 21.

[2] 1 id., 591, § 9; De Ruyter v. St. Peter's Church, 3 *N Y.*, 238.

Insolvency defined.

§ 1550. A debtor is insolvent within the meaning of this title when he is unable to pay his debts [*or* liabilities] from his own means, as they become due.

See Herrick v. Borst, 4 *Hill*, 650; Curtis v. Leavitt, 15 *N. Y.*, 9, 199.

What debts may be secured.

§ 1551. The debtor may by such assignment provide for any subsisting[1] liability against him which he might lawfully pay,[2] whether absolute or contingent.[3]

[1] Barnum v. Hempstead, 7 *Paige*, 568; Lansing v. Woodworth, 1 *Sandf. Ch.*, 43.

[2] The principal and lawful interest of a usurious debt may be provided for. Murray v. Judson, 9 *N. Y.*, 73.

[3] Cunningham v. Freeborn, 11 *Wend.*, 241; Kellogg v. Barber, 14 *Barb.*, 11.

Preferences

§ 1552. Except in special cases prescribed by law, a debtor may, by his assignment, give preference to one or more creditors or classes of creditors, over others.[1] But this can only be done absolutely[2] and without power of revocation.[3]

[1] Wilkes v. Ferris, 5 *Johns.*, 335; Wintringham v. La Foy, 7 *Cow.*, 735; Murray v. Riggs, 15 *Johns.*, 571, revsg. S. C., *sub nom.* Riggs v. Murray, 2 *Johns. Ch.*, 565; Hendricks v. Robinson, 2 *id.*, 283, affd. *sub nom.* Hendricks v. Walden, 17 *Johns.*, 438; McMenomy v. Roosevelt, 3 *Johns. Ch.*, 446; Nicoll v. Mumford, 4 *id.*, 522; Williams v. Brown, 4 *id.*, 682; Jackson v. Cornell, 1 *Sandf. Ch.*, 438.

[2] Barnum v. Hempstead, 7 *Paige*, 568; Boardman v. Halliday, 10 *id.*, 223; Strong v. Skinner, 4 *Barb.*, 546; Sheldon v. Dodge, 4 *Den.*, 217.

[3] Averill v. Loucks, 6 *Barb.*, 470.

The special exceptions are moneyed corporations and special partnerships. The former are regulated by statutes not embodied in the Code, the latter by the title on PARTNERSHIP.

Joint and separate debts.

§ 1553. Joint or joint and several debtors can prefer their joint creditors only out of joint property, and the

individual creditors of each, only out of the separate property of each.

This provision is new. Compare Kirby v. Schoonmaker, 3 *Barb. Ch.*, 46; Nicholson v. Leavitt, 4 *Sandf.*, 252; Jackson v. Cornell, 1 *Sandf. Ch.*, 348; Van Rossum v. Walker, 11 *Barb.*, 237.

Coercion not allowed

§ 1554. A debtor cannot, in any form, use the right of making preferences in such a manner as to make it the means of coercing his creditors.

Grover v. Wakeman, 11 *Wend.*, 187; 4 *Paige*, 23; 1 *Am. Lead. Cas.*, 76.

The instrument of assignment

§ 1555. An assignment in trust for the benefit of creditors must be in writing [subscribed by the debtor, or his agent thereunto authorized by writing, and, if it embraces a fee or freehold estate in real property, it must be sealed[1]]. It must be acknowledged by the person executing it, [or proved by a subscribing witness[2]] in the mode required for the acknowledgment or proof of conveyances of real property, and the acknowledgment or proof certified,[3] before its delivery.

[1] It is proposed to insert the words in brackets, in harmony with the requirements of the article on TRANSFERS.

[2] It is held that proof by a subscribing witness is not sufficient under the statute. (Cook v. Kelly, 12 *Abbotts' Pr.*, 35.) It is therefore proposed to insert the words in brackets.

[3] The words of the statute require it to be indorsed, but this would be satisfied by a certificate annexed. Thurman v. Cameron, 24 *Wend.*, 87.

Assignee takes subject to rights of third parties.

§ 1556. The assignee stands in no better position and has no higher rights in respect to things in action transferred by the assignment, than those of his assignor. He is not to be regarded as a purchaser for value.

Curtis v. Leavitt, 15 *N. Y.*, 195; Van Heusen v. Radcliff, 17 *id.*, 580; Griffin v. Marquardt, *id.*, 28; Leger v. Bonaffe, 2 *Barb.*, 475; Warren v. Fenn, 28 *id.*, 333; Marine & Fire Ins. Bank v. Jauncey, 1 *id.*, 486; Matter of Howe, 1 *Paige*, 125; Mead v. Phillips, 1 *Sandf. Ch.*, 83.

Inventory required.

§ 1557. The debtor, within twenty days after the date of the assignment, must[1] make and deliver to the county judge, a full and true inventory showing:

1. All the creditors of such debtor or debtors;

2. The place of residence of each creditor, if known to such debtor or debtors, or if not known, that fact must be stated;

3. The sum owing to each creditor, and the nature of each debt or liability, whether arising on written security, account or otherwise;

4. The true consideration of such indebtedness in each case, and the place where the indebtedness arose;

5. Every existing judgment, mortgage, collateral or other security for the payment of any such debt;

6. All of such debtor's estate at the date of the assignment which is exempt by law from execution;[2]

7. All of such debtor's estate at the date of such assignment, both real and personal, of every kind, not so exempt, and the incumbrances existing thereon, and all vouchers and securities relating thereto, and the value of such estate according to the best knowledge of such debtor or debtors.[3]

[1] In Evans *v.* Chapin (12 *Abbotts' Pr.* 161), this provision was held to be merely directory, and that an omission to comply with it did not avoid the assignment. By the previous decisions, the omission to annex schedules was held only a badge of fraud, and not conclusive evidence of an intent to defraud the creditors of the assignor. Cunningham *v.* Freeborn, 3 *Paige*, 557; aff'd, 11 *Wend.*, 241; Delaware & Hudson Canal Co. *v.* Elting, 3 *Ch. Sent.*, 29; Van Nest *v.* Yoe, 1 *Sandf. Ch.*, 4; S. C., 2 *N. Y. Leg. Obs.*, 70; Kellogg *v.* Slauson, 15 *Barb.*, 56; aff'd, 11 *N. Y.*, 302. By a subsequent section it is proposed to make both the record of the assignment, and the filing the inventory, essential.

[2] This provision is new. It is proper that the property which the debtor seeks to exempt should be specified in the inventory, though it need not pass by the assignment.

[3] Laws of 1860, 594, ch. 348, § 2.

Verification of inventory.

§ 1558. An affidavit must be made by the debtor or debtors, annexed to and delivered with the inventory, that the same is in all respects just and true, according to the best of such debtor or debtors' knowledge and belief.

Laws of 1860, 594, ch. 348, § 2.

Omission from inventory.

§ 1559. The omission from the inventory of particular things which are part of the estate does not restrict the

effect of general words in the assignment sufficient to transfer such things, unless the contrary intention clearly appears by the terms of the assignment.

[1] Platt v. Lott, 17 N. Y., 478; Wilkes v. Ferris, 5 Johns., 335.

Property exempt.

§ 1560. Property exempt by law from execution, and insurances upon the debtor's life, do not pass to the assignee, unless the terms of the assignment indicate an intention that they should.

This provision is new.

Recording assignment and filing inventory.

§ 1561. The assignment must be recorded, and the inventory filed, in the office of [the register of deeds, or if none,[1]] the clerk of the county in which each of[2] the debtors executing the instrument resided at the date thereof, and also in the county in which their principal place of business[3] was then situated.

[1] It is supposed that in those counties where there is a register of deeds, his office is the appropriate place for these records.

[2] To provide for the case of several debtors residing in different counties.

[3] Where there is a principal place of business, it seems proper that the records should be there.

Effect of omitting to record.

§ 1562. If each is not so recorded or filed within four days after its date, the assignment is void as to creditors and purchasers.

This section is new.

Assignment of real property.

§ 1563. Where the assignment embraces real property, it is also subject to the provisions of the article on Recording Transfers of Real Property.

Bond of assignees.

§ 1564. The assignee or assignees must, within thirty days after the date of the assignment, enter into a bond to the people of this state, in an amount to be fixed by the county judge, with sufficient sureties to be approved of by such judge, and conditioned for the faithful discharge of the trust, and for the due accounting for all moneys received by them, which bond must be filed as required by section 1561. Until this is done the assignee has no au-

thority to dispose of the estate or convert it to the purposes of the trust.

Laws of 1860, 595, ch. 348, § 3.

Accountings.

§ 1565. After the lapse of one year from the date of such assignment, the county judge, on the petition of a creditor, may grant an order requiring the assignee to show cause before him why he should not render an account of the trust, and may order payment of the petitioner's just proportional part of the fund. The county judge has the same power and jurisdiction to compel such accounting as surrogates have in relation to the estates of deceased persons; and he may examine the parties to such assignment, and other persons, on oath, in relation to such assignment and accounting, and all matters connected therewith, and may compel their attendance for that purpose.

Appeal.

§ 1566. The parties interested in the accounting have the same right to appeal from any order of the judge as is now given in case of appeals from the decrees of surrogates in relation to the accounts of personal representatives.

Laws of 1860, 595, ch. 348, § 4.

Prosecution of bond.

§ 1567. When such assignee fails to perform any order or judgment against him, made by a judge or court having jurisdiction, to compel the payment of any debt out of such trust-fund, the county judge or court may order his bond to be prosecuted in the name of the people by the district attorney of the county where the bond is filed, and must apply the moneys collected thereon in satisfaction of the liabilities of the debtor, in the manner in which the same ought to have been applied by the assignee.

Laws of 1860, 595, ch. 348, § 5.

For convenient uniformity in the mode of procedure, the following section is proposed as a substitute for the above (See Appendix D):

§ 1567. The provisions of the CODE OF CIVIL PROCEDURE respecting actions on the bonds of executors and administrators, and the distribution of proceeds of a recovery, apply to the assignee's bond, so far as the same are in their nature applicable.

Compensation.

§ 1568. In the absence of any provision to the contrary, the assignee is entitled to the same commissions as are allowed by law to executors and guardians.

Meacham *v.* Sternes, 9 *Paige*, 398.

Assignees protected for acts done in good faith.

§ 1569. An assignee, who acts fairly and in good faith in the execution of the trust, is not to be held liable therefor if the assignment is adjudged void.

Wakeman *v.* Grover, 4 *Paige*, 23; Ames *v.* Blunt, 5 *id.*, 13; Barney *v.* Griffin, 4 *Sandf. Ch.*, 552; Averill *v.* Loucks, 6 *Barb.*, 470.

What judge has jurisdiction.

§ 1570. The county judge referred to by this chapter is the county judge of the county in which the assignment is recorded, pursuant to section 1561; and in the city of New York, any of the judges of the Court of Common Pleas.

# PART III.

## NUISANCE.

TITLE I. General Principles.
II. Public Nuisances.
III. Private Nuisances.

## TITLE I.

### GENERAL PRINCIPLES.

SECTION 1571. Definition.
1572. Public nuisances.
1573. Private nuisances.
1574. Successive owners.
1575. Abatement does not preclude action.

Definition.

§ 1571. That is a nuisance which wrongfully causes loss, harm, annoyance, or great apprehension of danger, by

1. Creating public alarm;
2. Disturbing public order;
3. Endangering the public health;
4. Offending public decency;
5. Obstructing a right of way;
6. Disgusting the senses;
7. Or in any way rendering life, or the use of property uncomfortable.

Public nuisances.

§ 1572. A public nuisance is one which affects equally the rights of the whole community or neighborhood, although the extent of the damage may be unequal.

Private nuisances.

§ 1573. Every other nuisance is private.

Successive owners.

§ 1574. Every successive owner of a continuing nuisance is liable therefor in the same manner as the one who first created it.

Brown *v.* Cayuga & Susq. R. R. Co., 12 *N. Y.*, 486.

Abatement does not preclude action.

§ 1575. Abatement affects merely the present and future, and does not prejudice the right to compensation in damages for what is past.

Pierce *v.* Dart, 7 *Cow.*, 609.

# TITLE II.

## PUBLIC NUISANCES.

SECTION 1576. Lapse of time does not legalize.
1577. Remedies for public nuisance.
1578. Action.
1579. Abatement.

Lapse of time.

§ 1576. No lapse of time can legalize a public nuisance,[1] [which amounts to an actual obstruction of public right,] for every continuance thereof is a fresh nuisance.[2]

[1] Mills *v.* Hall, 9 *Wend.*, 315; Renwick *v.* Morris, 7 *Hill*, 375; 3 *id.*, 621; Dygert *v.* Schenck, 23 *Wend.*, 446; People *v.* Cunningham, 1 *Den.*, 524; Peckham *v.* Henderson, 27 *Barb.*, 207.

[2] Brown *v.* Cayuga & Susquehanna R. R. Co., 12 *N. Y.*, 486.

Remedies for public nuisance.

§ 1577. The remedies against a public nuisance are:

1. Indictment;
2. Action;
3. Abatement.

The remedy by indictment is regulated by the PENAL CODE and the CODE OF CRIMINAL PROCEDURE.

Action.

§ 1578. An individual may maintain an action for a public nuisance if it is specially injurious to himself,[1] but not otherwise.[2]

[1] Pierce *v.* Dart, 7 *Cow.*, 609.

[2] Davis *v.* Mayor, &c., 14 *N. Y.*, 506; Dougherty *v.* Bunting, 1 *Sandf.*, 1; Myers *v.* Malcolm, 6 *Hill*, 292; see Lansing *v.* Smith, 8 *Cow.*, 146; 4 *Wend.*, 9; First Baptist Church *v.* Schenectady & Troy R. R. Co., 5 *Barb.*, 79; Same *v.* Utica & Schenectady R. R. Co., 6 *id.*, 313; Pierce *v.* Dart, 7 *Cow.*, 609.

§ 1579. Any person may abate a public nuisance[1] which is specially injurious to him,[2] by removing, or, if necessary, destroying the thing, which constitutes the same, not committing a breach of the peace or doing wanton injury. Abatement.

[1] 2 Bouv. Inst., 575; Hart v. Mayor, &c., of Albany, 9 *Wend.*, 571; 3 *Paige*, 213; Wetmore v. Tracy, 14 *Wend.*, 250.

[2] Brown v. Perkins, 12 *Law Rep.* (*N. S.*), 98.

# TITLE III.

## PRIVATE NUISANCE.

SECTION 1580. Remedies for private nuisance.
1581. Abatement.
1582. When notice is required.

§ 1580. The remedies for a private nuisance are: Remedies for private nuisance.

1. Action; and
2. Abatement.

§ 1581. A person injured by a private nuisance may abate it by removing, or, if necessary, destroying the thing which constitutes the nuisance, not committing a breach of the peace or doing unnecessary injury. Abatement.

§ 1582. Where a nuisance results from a mere omission of the wrong-doer, and cannot be abated without entering upon his land,[1] reasonable notice must be given to him before entering to abate it.[2] When notice is required.

[1] As in the case of overhanging branches.

[2] See 3 Sharsw. Blackst., 5, and note 5.

# PART IV.

## MAXIMS OF JURISPRUDENCE.

§ 1583. The maxims of jurisprudence hereinafter set forth are intended not to alter any of the preceding provisions of this Code, but to serve as aids in their just exposition.

The maxims given in the text of this title, are not meant to be mere translations of the Latin originals mentioned in the notes; but such an explanation of them as is supposed to be most just and consonant with our legal system.

§ 1584. Equity is to be regarded in all things, but chiefly in the administration of the law

"In omnibus quidem, maxime tamen in jure, æquitas spectanda est. (Dig., 50, 17, 90, Paulus, Quæst., 15, 90.) Placuit in omnibus rebus præcissuam esse justitiæ æquitatis que quam stricti juris rationem. (Cod., 3, 1, 8)."

§ 1585. Reason is the life of the law, and when the reason of a law ceases, so should the law itself.

"Cessante ratione legis cessat ipsa lex." Co. Litt., 70 *b*.

The rule of the English law that a legacy from a parent to a child is presumed to be satisfied by a subsequent gift from the parent is one, says Judge DUER, which sprang from and was sustained by the peculiar policy of the English law of real property and succession, and is plainly inconsistent with the spirit of the American law upon those subjects. "The reasons of the doctrine with us have ceased to exist, and if there is any truth or obligatory force in the maxim *cessante ratione cessat ipsa lex*, the doctrine has perished with them." Langdon *v.* Astor's Exec'rs, 3 *Duer*, 557.

Again, the rule that the *opinion* of witnesses is not admissible, is "based upon the presumption that the tribunal before which the evidence is given is as capable of forming a judgment on the facts as the witness. When circumstances rebut this presumption, the rule

itself naturally ceases. *Cessante ratione*, &c. Hence it that on questions of science, skill, trade, or others of the like kind, persons of skill, or experts, are permitted to give their opinions." (Dewitt *v.* Barley, 9 *N. Y.*, 375.)

§ 1586. The reason being the same, the law should be the same.

"Ubi eadem ratio ibi idem jus." It was long the settled rule respecting a writing under seal that a material alteration of it by the obligee rendered the instrument void. (Pigot's Case, 11 *Rep.*, 27; Davidson *v.* Cooper, 11 *M. & W.*, 799.) The obvious reason of the rule existed as well in the case of an instrument not sealed, and the rule was therefore applied to bills of exchange and promissory notes. (Master *v.* Miller, 4 *T. R.*, 326.) Still later the principle was declared to extend to mercantile guaranties. (Powell *v.* Divett, 13 *East*, 29.)

§ 1587. Every one must so use his own right as not to infringe upon the right of another.

*Sic utere tuo ut alienum non lædas.* "The principle of this maxim is a sound and beneficial one. It implies what the law asserts, that all men have equal rights before the law." (Carhart *v.* Auburn Gas Co., 22 *Barb.*, 307.) Though the proprietor of lands bordering upon a stream may use the water for his own purposes he may not in any way infringe upon the rights of those above him, as for example by checking the flow of the stream; nor the rights of those below him by diminishing the volume or injuring the quality of the water. The maxim is very frequently invoked and applied in cases of nuisance, for though a man may generally use his own land as he pleases, he may not erect upon it a nuisance to the annoyance of his neighbor. (Hay *v.* Cohoes Co., 2 *N. Y.*, 161; Brown *v.* Cayuga & S. R. Co., 12 *N. Y.*, 494) "Acts may be harmless in themselves so long as they injure no one, but the consequences of acts often give character to the acts themselves." (Van Pelt *v.* McGraw, 4 *N. Y.*, 43.)

§ 1588. No one may change his purpose to the detriment of another's legal right.

"Nemo potest mutare consilium in alterius injuriam." (Dig., 50, 17, 75.) The spirit and application of this maxim is examined by Chancellor KENT, in Dash *v.* Van Kleeck, 7 *Johns.*, 504. And see *ante*, § 893.

§ 1589. Any one may renounce the advantage of a legal rovision intended for his benefit alone.[1] But no law, tablished for reasons of public policy, can be contravened waived by the agreement of individuals.[2]

[1] "Quilibet potest renunciare juri pro se introducto." Compare "Modus et conventio vincunt legem." Upon this principle, one may omit to plead his infancy or other disability, or the statute of limitations, or time of prescription, in avoidance of his obligations, or may waive notice of the dishonor by a prior party of a bill or note (Conkling *v.* King, 10 *N. Y.*, 446; and see Buck *v.* Burk, 18 *N. Y.*, 341.) One may also, upon the same principle, waive a statutory right (Tombs *v.* Rochester & S. R. R. Co., 18 *Barb.*, 583; Buel *v.* Trustees, &c., 3 *N. Y.*, 197), or a constitutional provision made for his benefit, as, for example, the right of trial by jury. (Lee *v.* Tillotson, 24 *Wend.*, 337; People *v.* Murray, 5 *Hill*, 468; Baker *v.* Braman, 6 *id.*, 48; and see People *v.* Van Rensselaer, 9 *N. Y.*, 333; People *v.* Rathbun, 21 *Wend.*, 542.)

[2] "Privatorum conventio juri publico non derogat." (Dig., 50, 17, 45.) "Jus publicum privatorum pactis mutari non potest." (Papinian.) Though individuals may generally waive provisions which the law prescribes for their benefit or protection, yet their private compacts cannot be permitted either to render that just or sufficient between themselves which the law declares essentially unjust or insufficient, or to injure the legal rights of others, or to impair the integrity of a rule, the strict maintenance of which is necessary to the common welfare. The principle of this maxim has forbidden, in our law, marriage brocage bonds; undue restraint of trade; a seaman's insurance of his wages; an agreement to waive a claim arising from the fraud of one of two contracting parties (see § 541); a mortgagor's covenant with a mortgagee not to enforce his equitable right of redemption, an agreement to waive the benefit of the exemption laws, &c. (See Kneetle *v.* Newcomb, 22 *N. Y.*, 249; Mann *v.* Herkimer County Ins. Co., 4 *Hill*, 192.)

§ 1590. Acts which require a fixed purpose are incomete, unless performed with full knowledge.

"In totum omnia quæ animi destinatione agenda sunt non nisi vera et certa scientia perfici possunt." The principle of this maxim governs the courts in administering relief against the consequences of mistake and ignorance. (Story Eq. Jur., c. 5; Fonblanque Eq., b. 1, c. 2, § 7. See note to § 985, *ante*.)

§ 1591. He suffers no legal wrong who consents or contributes to the act which occasions his loss.

"Volenti non fit injuria." (Bracton, fol. 18.) "Nulla injuria est quæ in volentem fiat." (Dig., 47, 10, 1, 5. "Quod quis ex culpa sua damnum sentit non intelligitur damnum pentive." A husband who connives at the adultery of his wife has no right to a divorce on the ground of her infidelity. (Forster *v.* Forster, 1 *Hagg. Con.*, 144.) One who consents to the stowage of his goods upon the deck of a ship, can maintain no action for a wrongful stowage of them. (Gould *v.* Oliver, 2 *Scott N. R.*, 257.) One who voluntarily pays a just debt contracted during his infancy, or barred by the statute of limitations, has no right to repayment of the money. (See Bates *v.* N. Y. Ins. Co., 3 *Johns. Cas.* 240; Seagar *v.* Sligerland, 2 *Caines*, 219; and compare Moulton *v.* Bennett, 18 *Wend.*, 588.)

§ 1592. No one shall be injured by that to which he was neither party nor privy.

"Res inter alios acta alteri no cere non debet." The principle of this perhaps most important and useful of the maxims relating to the law of evidence, forbids in general (for necessity has introduced some exceptions to the rule), that any one shall be bound by acts or conduct of others, to which neither in fact nor in law, he was party or privy. It is illustrated by the rules respecting declarations and private memoranda of third persons; and respecting the effect of judgments, to which one is altogether a stranger. (Broom's Maxims, 432.)

§ 1593. Acquiescence in an error by one who might take advantage of it, obviates its effect.

"*Consensus tollit errorem*, is a maxim of the common law and the dictate of common sense." (Rogers *v.* Cruger, 7 *Johns.*, 611.) Upon the principle of this maxim rests an important branch of the doctrine of waiver. An irregularity in the service of a paper in a cause is waived generally by retaining and acting upon it. (Georgia Lumber Co. *v.* Strong, 3 *How. Pr.*, 246.) Thus a voluntary and general appearance in an action is a waiver of all defects in the summons or other process. (Webb *v.* Mott, 6 *How. Pr.*, 440, and Gates *v.* Russell, 17 *Johns.*, 461.)

§ 1594. No one may take advantage of his own wrong.

"Nullus commodum capere potest de injuria sua propria."

This is a rule of such binding force as to be held obligatory against the wrong-doer, even as between himself and one cognizant or even participant of the wrong. If one, for the purpose of defrauding his creditors, conveys his property to another, he cannot set up the fraud to avoid the deed as between himself and his accomplice even. (Jackson *v.* Garnsey, 16 *Johns.*, 189. Safford *v* Wyckoff, 4 *Hill*, 457. See Moore *v.* Livingston, 30 *Barb.*, 543; 14 *How. Pr.*, 11; Ford *v.* Harrington, 16 *N. Y.*, 285.) So when performance of a condition is rendered impossible by the act of the obligee, the obligor incurs no penalty. (Com. Dig., *Condition*, D. 1; see *ante*, §§ 649, 650.

§ 1595. One who has fraudulently parted with the possession of a thing may be treated as if it was still in his possession.

"Qui dolo desierit possidere pro possidente damnatur." See Nichols *v.* Michael, 23 *N. Y.*, 267.

§ 1596. One who knows and does not endeavor to prevent that which is done on his behalf is considered as commanding it.

"Semper qui non prohibit pro se intervenire mandare creditur."

§ 1597. One who enjoys the benefits of a thing must bear also its burdens.

"Qui sentit commodum, sentire debet et onus." One who takes an estate in land and enjoys the benefits resulting from his title, must bear the burdens of the incumbrances upon the land and of the covenants that run with it. (Priestly *v.* Foulds, 2 *Scott N. R.*, 225; Paine *v.* Bonney, 6 *Abb. Pr.*, 106; Frost *v.* Saratoga Ins. Co., 5 *Denio*, 158; Bartlett *v.* Crozier, 17 *Johns.*, 453.) The right of a partner to share the profits of the partnership business is justly coupled with a corresponding liability for its debts.

§ 1598. No one can transfer a right that he does not possess.

"Nemo plus juris ad alium transferre potest quam ipse habet." (Ulpian Dig., 50, 17, 54.) "A plain dictate of common sense." (THOMPSON, J., Ventress *v.* Smith, 10 *Peters*, 161.) The exception to this rule, maintained by the common law, that all sales and contracts of anything vendible in markets overt should bind those who had rights in the thing, though they are not parties to the sale or contract, is not recognized in this country. A sale imports nothing more than that the *bona fide* purchaser succeeds to the rights of the vend-

Com., 324.) The principle applies also to the pledge of goods by one who is not the owner of them. (Story Bailments, § 340.) It applies also to transfers of estates in real property (4 Kent, 10).

This doctrine is however to be construed with reference to the law of agency. (See *ante*, §§ 708, 1399.)

§ 1599. One who grants a thing is presumed to grant also that which is essential to the complete use and enjoyment of the thing granted.

"Cuicunque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potest." The grant of a piece of land surrounded by other land of the grantor, grants also by implication the right of a convenient way over such other land. The grant of a corporate franchise implies a grant to make by-laws and to exercise all other powers which are necessary for effectuating the object of the charter.

§ 1600. The law gives redress for every wrong.

"Ubi jus ibi remedium." Johnstone *v.* Sutton, 1 *T. R.*, 312.

Every wrongful invasion of a right imports injury and damage, though there be no pecuniary loss, and entitles the person injured to redress. (Ashby *v.* White, 2 *Ld. Raym.*, 953.)

§ 1601. The law will not interfere between parties whose right or whose wrong is equal.

"In æquali jure melior est conditio possidentis. In pari delicto potior est conditio defendentis." In case of illegal contracts says STORY, or in those in which one party has placed property in the hands of another for illegal purposes as for smuggling, if the latter refuses to account for the proceeds, and fraudulently or unjustly withholds them, the former must bear his loss, for *in pari delicto, &c.* (Eq. Jurisp., §§ 61, 298; Story on Ag., 198. See Ford *v.* Harrington, 16 *N. Y.*, 285.) So when there is equal equity the defendant has as strong a claim to the protection of a court of equity for his title, as the plaintiffs has to its assistance in order to assert his title, and thus the court will not interpose on either side. (See Pick *v.* Burr, 10 *N. Y.*, 294; Tracy *v.* Talmage, 14 *N. Y.*, 162, 181, 216; Candee *v.* Lord, 2 *N. Y.*, 269, 276.)

§ 1602. The earlier in time has the stronger right.

"Qui prior est in tempore potior est in jure." This principle makes the foundation of all original titles to lands

both by private and by public law; the first occupant acquires the first right. The maxim applies also in cases of mortgages, attachments, executions and other liens attaching upon property either by the agreement of parties or by the operation of law. Priority is the essential quality of a patentable invention. Where equitable claims are in other respects equal, the first in time has strongest right, and gains the advantage. (See Muir *v.* Schenck, 3 *Hill*, 228; Poillon *v.* Martin, 1 *Sandf. Ch.*, 578; Watson *v.* Le Row, 6 *Barb.*, 485.)

§ 1603. No one is responsible for the consequences of superhuman causes.

"Actus Dei facit nemini injuriam." If an event, which no prudence could provide against or evade, renders impossible the performance of the condition of a bond, the obligor is excused. A common carrier is not liable for damage done to goods in his charge by storms, floods or the like inevitable events. (See *ante*, § 927.)

§ 1604. The law aids those who are vigilant, not those who sleep upon their rights.

"Vigilantibus non dormientibus jura subveniunt." (Toole *v.* Cook, 16 *How. Pr.*, 144.) Thus the law may deny relief to one who has long and negligently delayed to file a bill for specific performance. (Milwood *v.* Earl of Thanet, 5 *Vesey*, 720; Alley *v.* Duchamps, 13 *Ves.*, 228.) So in the spirit of this maxim the statutes of limitation prescribe definite periods after the expiration of which the law will refuse its aid, however clear may be the right of the party claiming it, or the wrong of his opponent.

§ 1605. The law regards the form less than the substance.[1]

[1] Francis' Maxims, No. 13. On this principle the law grants relief to one who has omitted to perform an obligation at a time specified by the contract, when it is evident that punctual performance was not an essential element of the agreement. (Adams' Equity, 88). So it declares sufficient certain defective executions of powers; as, for example, the execution of a power by will when it is required to be by deed or other instrument *inter vivos;* so want of a seal, or of witnesses, or of a signature, or defects in the limitations of the estate or interests, will be aided. In the same spirit the law upholds in certain cases the defective performance of conditions. (Story Eq. Jur., § 97; Popham *v.* Bampfield, 1 *Vernon*, 79; Francis' Maxims, 60.)

§ 1606. The law regards that as done, which ought to have been done, so far as to have effect against him who ought to have done it.

Thus an agreement for a valuable consideration will be treated as actually executed from the period when it ought to have been performed in favor of a person entitled to insist on its performance. On this principle money covenanted or devised to be laid out in land, will be treated as real estate; and land contracted or devised to be sold will be treated as money. (Story Eq. Jur., 64, *g*; Adams' Equity, 74.)

§ 1607. The law regards that which does not appear, or is not proven, as if it did not exist.

"De non apparentibus et non existentibus eadem est ratio." Thus, upon a special verdict a court will not assume a part not stated in it nor draw inferences of facts necessary for the determination of the case prove other statements therein. (Tanerd *v.* Christy, 12 *M. & W.*, 316; Jenks *v.* Hallet, 1 *Caines*, 60; Powell *v.* Waters, 8 *Cow.*, 682; Gwynne *v.* Burrell, 6 *Bing. N. C.*, 539; Youngs *v.* Lee, 12 *N. Y.*, 554. See Hoyt *v.* Thompson, 19 *N. Y.*, 207.)

§ 1608. One who seeks equity, must do equity.

This maxim applies principally to one who seeks aid or relief in the character of a plaintiff; such a one must give effect to all the equitable rights of his adversary respecting the subject matter of the suit. Thus when one seeks the benefit of a purchase made for him in the name of a trustee who has not only paid the purchase money, but has made other advances in his behalf, the court will relieve the plaintiff only upon his payment of all the money due to the trustee. (Story Eq. Jur., § 62 *a.*) And one who prays leave to redeem lands mortgaged by him, will be allowed to do so on condition of paying not only the sum for the security of which the lands were mortgaged, but also all subsequent loans made to him by the mortgagee, though they were not expressly made upon the faith for the land.

§ 1609. The law never requires an impossibility.

"Lex non cogit ad impossibilia." Co. Litt., 231 *b*. If an estate is granted upon a condition subsequent which is essentially impossible, the condition is void and the estate is absolute. (2 Black. Com., 186.) If performance of the condition of a bond is rendered impossible by the act of the obligee, the obligor is excused. (Holmes *v.* Guppy, 3 *M. & W.*, 389.) Compare § 1603. But the

law does not excuse the non-performance of impossibilities which one has expressly undertaken to perform, except as provided by §§ 542, 543, *ante*.

§ 1610. The law will neither do nor require an idle act.

"Lex non cogit ad vana seu inutilia. Lex nil frustra facit." It is a settled principle, says Chancellor KENT, that a court will not undertake to exercise a power, unless it can exercise it to some purpose. (Huntington *v.* Nicholl, 3 *Johns.*, 598.) It will, for example, refuse a writ of mandamus, if it is manifest that it must be vain and fruitless, or cannot have a beneficial effect. (People *v.* Supervisors of Greene, 12 *Barb.*, 222.) Nor, on the principle of this maxim, will the law require individuals to bring suits or do other acts which will be fruitless and in vain. (Loomis *v.* Tifft, 16 *Barb.*, 544.)

§ 1611. The law disregards trifles.

"De minimis non curat lex. Nimia subtilitas in jure reprobatur. Bonæ fidei non convenit de apicibus juris disputare." (*Ulpian*, Dig., 17, 1, 29.) The law will not deprive one of all compensation on account of unintentional and unimportant variations from the terms of his agreement (Smith *v.* Gugerty, 4 *Barb.*, 621). Nor will a court restrain by injunction the publication of a solitary letter which has neither actual value nor literary merit, the publication of which would not be productive of injury nor offend the most delicate sensibility (Woolsey *v.* Judd, 4 *Duer*, 599; Marshall *v.* Peters, 12 *How. Pr.*, 223; Ex parte Becker, 4 *Hill*, 615). But this maxim never applies to the case of a positive and wrongful invasion of a right. (COWEN, J., Seneca R. Co. *v.* Auburn & R. R. Co., 5 *Hill*, 170.)

§ 1612. As a general rule, particular words derogate from eneral words, and those expressions are of most force hich point to specific objects.

"In toto jure generi per speciem derogatur et illud polissimum habetur quod ad speciem directum est." See *ante*, §§ 593, 990.

§ 1613. Contemporaneous exposition is generally the est and most decisive.

"Contemporanea expositio est optima et fortissima in lege." In construing a statute, great regard should be paid to the opinion in respect to it, entertained by persons learned in the law, at the time of its passage. (Sedgwick Stat. & Const. Law, 251; Dwarris, 562.) "A contemporaneous is generally the best construction of a statute. It gives the sense of a community of the terms

made use of by a legislature. If there is ambiguity in the language, the understanding and application of it, when the statute first comes into operation, sanctioned by long acquiescence on the part of the legislature and judicial tribunals, is the strongest evidence that it has been rightly explained in practice. A construction under such circumstances becomes established law." (Packard *v.* Richardson, 17 *Mass.*, 143; Curtis *v.* Leavitt, 15 *N. Y.*, 217). "A contemporaneous exposition, even of the Constitution of the United States, practised and acquiesced in for a period of years, fixes the construction." (4 Kent Com., 465, note).

§ 1614. The greater contains the less.

"Omne majus continet in se minus. In eo quod plus est semper inest et minus. (Dig., 50, 17, 110.) Non debet cui plus licet. Quod minus est non licere." (Ulpian, Gothofredi, Reg. Juris.) Compare Dig., 50, 17, 26-37.

One makes a good tender of a debt due when he tenders in due form more than he is bound to pay (Wade's Case, 5 *Rep.*, 115; Dean *v.* James, 4 *B. & Ad.*, 546); and his acts are valid if having permission to do several things for his own benefit he does some of them (Isherwood *v.* Oldknow, 3 *M. & S.*, 392), or if, as the agent of another, he does less than his power authorizes him to do. (Story Agency, § 172.)

§ 1615. The useful is not vitiated by the useless. [*Or*, Surplusage never vitiates.]

"Utile per inutile non vitiatur." This maxim has long been familiar to the common law. It has had frequent application in the law of conveyancing, of pleading and of evidence. Thus, a deed which grants an estate by language explicit and certain, is not defeated or affected by the presence of words that are repugnant to the general sense. So in pleading, surplusage, or the allegation of purely irrelevant matter, does not affect that which is pertinent and in other respects valid. Nor as matter of evidence, need an averment, which is wholly immaterial, be proved. (Fairchild *v.* Ogdensburgh R. R., 15 *N. Y.*, 337; Mason *v.* Franklin, 3 *Johns.*, 206; Gates' case, 4 *id.*, 367). A verdict which finds the whole issue is not vitiated by finding more (Patterson *v.* United States, 2 *Wheat.*, 225).

§ 1616. That is certain which can be made certain.

"Id certum est quod certum reddi potest." Thus when a testator gives his "*back* lands" to certain devisees, the description is rendered definite and certain when it is shown by evidence that particular parcels of land were

called and known by that name by the testator and his family. (Ryerss *v.* Wheeler, 22 *Wend.*, 148.) So, when a rule for the commitment of a person did not specify the sum for non-payment of which the commitment was ordered, but directed a referee therein named to estimate it, it was declared, on the principle, *id certum est, &c.*, that the rule was sufficiently definite in respect to the amount for the referee's report, when filed and confirmed, became part of the rule and the act of the court. (People *v.* Nevins, 1 *Hill*, 158; People *v.* Cavanaugh, 2 *Abb. Pr.*, 88; Ostrander *v.* Mather, 2 *Hill*, 329; Smith *v.* Tyler, *id.*, 648). See *ante*, §§ 539, 544.

§ 1617. That which was originally void does not become valid by lapse of time.

"Quod ab initio non valet in tractu temporis non convalescit. Quod initio vitiosum est non potest tractu temporis convalescere."

"The general rule is that whenever any contract or conveyance is void, either by a positive law or upon principles of public policy, it is deemed incapable of confirmation upon the maxim, *quod ab initio*," &c. (Story Eq. Jur., § 306; Vernon's case, 4 *Co. Rep.*, 2 b.) 'No length of time,' said Lord Talbot, 'will bar a fraud.' (Cas. temp. TALBOT, 73.) It is certainly true, says Mr. Justice STORY, that length of time is no bar to a trust clearly established: and in a case where fraud is imputed and proved, length of time ought not, upon principles of eternal justice, to be admitted to repel relief. On the contrary, it would seem that length of time, during which the fraud has been successfully concealed and practised is an aggravation of the offense and calls more loudly upon a court of equity to grant ample and decisive relief. But length of time necessarily obscures all human evidence: and as it thus removes from the parties all immediate means to verify the nature of the original transactions, it operates by way of presumption in favor of innocence and against imputation of fraud." (Prevost *v.* Gratz, 6 *Wheat.*, 498.)

In certain cases, also, though the original agreement was void, the law presumes a new and valid contract from additional circumstances. Thus a deed that is void may be good to some purposes; as if A lets land that does not belong to him, to B: if A afterwards acquires the land, the lease is valid. So it was in the Roman Law; if one pledged the property of another, and it afterwards became his own, his creditor had his action. (D. 13, 7, 41.) And though if a husband sold the land of his wife's dower, the sale was invalid; yet if at her death the land became his, the sale was established. (D. 41, 3, 42.) See *ante*, § 1428.

§ 1618. The incident follows the principal, not the principal the incident.[1]

[1] "Accessorium non ducit, seu sequitur suum principale." By a general grant of the reversion the rent will pass with it as an incident, though by the grant of the rent generally, the reversion will not pass (2 Blackst. Com., 176). So the grantor of lands or the assignee of a lease assumes the burden of the covenants that run with the land or are reserved by the lease (Van Wicklen *v.* Paulson, 14 *Barb.*, 154; Jackson *v.* Willard, 4 *Johns.*, 41.)

§ 1619. The law gives effect, if possible, to the lawful intention of the parties to an act or obligation.

"Ut res magis valeat quam pereat." This is a general principle which governs the construction of all agreements, oral or written, and of all unilateral instruments, like deeds or wills, which are designed to embody the intention of a party (Fish *v.* Hubbard, 21 *Wend.*, 652; Mason *v.* White, 11 *Barb.*, 173; Aiken *v.* Albany N. & C. R. R. Co., 26 *id.*, 289; Warhus *v.* Bowery Savings Bk., 4 *Duer*, 59; Hall *v.* Newcomb, 3 *Hill*, 233).

§ 1620. Every thing is to have a reasonable construction, and everything necessary to make a rule reasonable is implied.

Jones *v.* Gibbons, 8 *Exch.*, 922; see Buck *v.* Burk, 18 *N. Y.*, 339, 341.

# PART V.

## DEFINITIONS AND GENERAL PROVISIONS.

TITLE I. Definitions.
II. General Provisions.

## TITLE I.

### DEFINITIONS.

SECTION 1621. Words, how used.
1622. Degrees of care and diligence.
1623. Care and diligence.
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1633. Third persons.
1634. Usage, custom, &c.
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1636. Time.
1637. Sundry words.
1638. Genders.
1639. Numbers.

**Words, how used.**

§ 1621. Words used in this Code are to be construed in their ordinary and proper sense, except when a special meaning is attached to them by other provisions of this Code.

**Degrees of care and diligence**

§ 1622. There are three degrees of care and diligence mentioned in this Code, namely, slight, ordinary and great. The higher degrees include the lower.

**Care and diligence.**

§ 1623. Slight care or diligence is such as persons of ordinary prudence usually exercise about their own affairs of slight importance: ordinary care or diligence is such as

they usually exercise about their own affairs of ordinary importance; and great care or diligence is such as they usually exercise about their own affairs of great importance.

Degrees of negligence.

§ 1624. There are three degrees of negligence mentioned in this Code, namely, slight, ordinary, and gross. The lower degrees include the higher.

Negligence.

§ 1625. Slight negligence consists in the want of great care and diligence; ordinary negligence, in the want of ordinary care and diligence; and gross negligence, in the want of slight care and diligence.

Children.

§ 1626. Children include all legitimate or legitimated descendants in the direct line.

Debtor and creditor.

§ 1627. Except in Part III of this Division, every one who owes to another the performance of any legal obligation is called a debtor, and the one to whom he owes the same is called a creditor.

Good faith.

§ 1628. Good faith is an honest intention to abstain from taking any unconscientious advantage of another, even through any forms or technicalities of law.

Notice.

§ 1629. Notice is actual or constructive. Actual notice is actual information of a fact. Constructive notice is either notice imputed by the law without regard to the fact, or actual information of circumstances which are sufficient to put a reasonable man upon inquiry. There can be no notice of that which does not exist, and never has existed.[1]

[1] Griffin *v.* Goff, 12 *Johns.*, 422; Jackson *v.* Richards, 2 *Cai.*, 343.

Paper.

§ 1630. Paper, within the meaning of this Code, is any material upon which it is usual to write.

Person.

§ 1631. Except where the word is used by way of contrast, "person" include not only human beings, but bodies politic or corporate.

Several.

§ 1632. "Several" means two or more.

§ 1633. "Third persons" include all who are not parties to the obligation or transaction concerning which the phrase is used. Third persons.

§ 1634. "Usage" means a valid usage, as defined by section 603. "Custom," except in section 603, means "usage." "Usual," and "customary," mean "according to usage." Usage custom, &c.

§ 1635. A valuable consideration is a thing of value parted with, or an obligation assumed, which is a substantial compensation for that which is obtained thereby. It is also called simply "value." Value.

§ 1636. Duress, menace, fraud, undue influence, and mistake, are defined in sections 550 to 561, inclusive. And whenever the meaning of a word or phrase is defined in any part of this Code, such definition is applicable to the same word or phrase wherever it occurs herein, except where a contrary intention plainly appears. Sundry words.

§ 1637. A year means a calendar year, and a month a calendar month. Fractions of a year are to be computed by the number of months, thus, half a year is six months. Fractions of days are to be disregarded in computations which include more than one day, and involve no questions of priority Time.

§ 1638. The masculine gender includes the feminine, except where a contrary intention plainly appears. Genders.

§ 1639. The singular number includes the plural, and the plural the singular, except where a contrary intention plainly appears. Numbers.

# TITLE II.

## GENERAL PROVISIONS.

SECTION 1640. Construction of the Code.
1641. Repeal of former statutes.
1642. Time when Code takes effect.

Construction of the Code.

§ 1640. The rule that statutes in derogation of the common law are to be strictly construed has no application to this Code.

Repeal of former statutes.

§ 1641. All statutes, laws and rules heretofore in force in this state, inconsistent with the provisions of this Code, are hereby repealed and abrogated; but such repeal or abrogation does not revive any former law heretofore repealed, nor does it affect any right already existing or accrued, or any proceeding already taken, except as in this Code provided.

It is proposed to add a special repealing act in the next report.

Time when Code takes effect.

§ 1642. This Code shall take effect on the day of , 186 .

# APPENDIXES

TO THE

# DRAFT OF THE CIVIL CODE.

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## CONTENTS.

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APPENDIX A. A chapter on succession, which may be substituted for chapter IX of the Draft of the Civil Code.

B. Proceedings upon complaints between Masters and Apprentices.

C. Proceedings in surrogates' courts in respect to Guardians.

D. Proceedings relating to the estate of Deceased Persons.

E. Remedy against debtor holding contract to buy land.

# APPENDIX A.

## A CHAPTER ON SUCCESSION

NOTE.—Which may be substituted for chapter IX of the Draft of the Civil Code, if the adoption of that chapter is deemed inexpedient.

In this chapter modifications of the law of succession are proposed by making the husband and wife, in case of death without descendants, the ultimate heir, subject to a charge in favor of father, mother, brother and sister. Aliens are authorized to take by succession in the same manner as citizens. Succession to lands purchased with partnership assets is determined. The rule in regard to advancements is precisely defined. The rights of husband and wife, as to succession, are regulated, and curtesy and dower abolished.

ARTICLE I. Distinction of Property.
II. Succession to Real Property.
III. Succession to Personal Property.

## ARTICLE I.

### DISTINCTION OF PROPERTY.

SECTION 1. Term "Real property" defined.
2. What are assets.
3. Property set apart for husband, widow or child.

Term "Real property" defined.

§ 1. The real property of a decedent, for the purposes of this chapter, includes every estate, interest and right, legal and equitable, in lands, tenements and hereditaments, except such as are determined or extinguished by his death, and except leases for years, and estates for the life of another person, and pews in churches.

1 R. S., 755, § 27; modified by excepting, also, pews.

What are assets.

§ 2. The following property of a decedent is personal assets, and subject to the exceptions stated in section 3, is to be applied and distributed as part of the personal property of the decedent, by the executors or administrators:

1. Leases for years; lands held by the decedent from year to year; and estates held by him for the life of another person;

2. The interest which may remain in the decedent at the time of his death, in a term for years, after the expiration of any estate for years therein, granted by him or any other person;

3. The interest in lands devised to an executor for a term of years, for the payment of debts;

4. Things annexed to the freehold, or to any building, for the purpose of trade or manufacture, and not fixed into the wall of a house, so as to be essential to its support;

5. The crops growing on the land of the deceased, at the time of his death;

6. Every kind of produce raised annually by labor and cultivation, excepting grass growing and fruit not gathered;

7. Rent due to the decedent, which had accrued at the time of his death;

8. Debts secured by mortgages, bonds, notes or bills; emblements, accounts, money, and bank bills, or other circulating medium, things in action, insurances upon life, where the policy is payable to the executors or administrators of the decedent; stock in any company, whether incorporated or not, and pews in churches;

9. Goods, wares, merchandise, utensils, furniture, cattle, and provisions;

10. Every other species of personal property and effects, except that the succession to any property which, by common law, would descend to the heir shall not be affected by this subdivision.

2 R. S., 82, §§ 4, 8.

Property set apart for husband, widow or child.

§ 3. [Here take in section 509, of the Draft of the Civil Code, which relates to the homestead, household furniture, &c., which is to be set apart for the family.]

## ARTICLE II.

### SUCCESSION TO REAL PROPERTY.

SECTION 4. General rule as to the order in which real property vests.
5. Lineal descendants in equal degree.
6. Husband or widow, to what extent to succeed.
7. When the father succeeds.
8. When the mother succeeds.

SECTION 9. Collateral relatives of equal and unequal degrees.
10. Collaterals of father and mother.
1. Collaterals of father, when preferred.
2. Collaterals of mother, when preferred.
3. When both succeed.
4. Other cases.
11. When advancement to be set-off or deducted.
12. Terms "living" and "having died," "paternal side," &c.

General rule as to the order in which real property vests.

§ 4. The real property of every person who dies, without effectually devising the same, vests, subject to the rules hereinafter prescribed:

1. In the nearest lineal descendants of the decedent, and the successors of those who are deceased;

2. In the widow, or in the husband;

3. In the father;

4. In the mother;

5. In the nearest collateral relatives, and the successors of those who are deceased;

6. On a defect of such heirs, in the people of the state.

1 R. S., 751, § 1.

Lineal descendants.

§ 5. Property of a decedent who leaves several lineal descendants, entitled to share in the property, vests in them in equal shares, if they are of equal degree of consanguinity; if they are of unequal degree of consanguinity to him, each of those who are of the nearest degree take the share to which he would have been entitled had all the descendants in the same degree who have died leaving issue, been living; and the issue of the deceased descendants respectively take the shares which such descendants would have received if living.

1 R. S., 751, §§ 2, 3, 4.

Husband or widow, to what extent to succeed.

§ 6. The husband or widow of the decedent succeeds in the following cases:

1. If the decedent dies without descendants, leaving a father or mother, the husband or the widow succeed to the whole property, subject to a charge in favor of the father and the mother, or either of them, of one-half the value of the property;

2. If the decedent dies without descendants, leaving no parent, and leaving a brother or sister, the husband or the widow succeeds to the whole property, subject to a charge in favor of the brothers and the sisters, or either of them, of one half the value of the property;

3. If the decedent dies without descendants, leaving no parent, or brother or sister, the husband or the widow succeed to the whole property.

The first two subdivisions of this section, directing a charge in favor of the parent, or brother or sister, take effect only when the value of the property, estimated as of the time of the decedent's death, after deducting the charge, exceeds ten thousand dollars. In other cases, such charge is to be abated, so as never to reduce the value coming to the husband or widow, below ten thousand dollars. The succession of the husband or widow to such property is not prevented by the charge. An adjustment of the amount of such charge may be had by an action in the supreme court.

This section applies to the separate property of married women as well as in other cases.

This section is new.

When the father succeeds.

§ 7. If the decedent dies, without descendants, leaving no husband or widow, and leaving a father, the property vests in the father, unless it came to the decedent on the maternal side, and the mother is living; but if the mother is dead, the property vests in the father for life, and on his decease in the brothers and sisters of the decedent, and their descendants, according to the rule provided in section 9, if there are any, but if there is no such brother or sister or their descendant living, the property vests in the father in fee.

1 R. S., 751, § 5.

When the mother succeeds.

§ 8. If the decedent dies without descendants, leaving no husband or widow, and leaving no father or leaving a father not entitled to succeed under the preceding section, and leaving a mother, and a brother or sister, or the descendant of a brother or sister, the property vests in the mother during her life, and on her decease, in the brothers and sisters of the decedent, and their descendants, according to the rule provided in section 9, if any there are, but if there is no such brother or sister or their descendant living, the property vests in the mother in fee.

1 R. S., 752, § 6.

Collateral relatives of equal and unequal degrees.

§ 9. If the decedent dies without descendants, leaving no husband or widow, and leaving no father or mother, capable of succeeding to the property, it vests in the brothers and sisters of the decedent and the descendants of any deceased. If there are several such relatives, all of equal degree of consanguinity to

him, the property vests in them in equal shares. But if there are several such relatives, of unequal degree of consanguinity to him, each of those who are of the nearest degree succeeds to the share to which he would have been entitled, had all the collaterals, in the same degree, who have died leaving issue, been living; and the issue of the collaterals who have died, respectively succeed to the shares which such collaterals would have received if living.

Collaterals of unequal degrees.

1 R. S., 752, §§ 8, 9.

§ 10. If the decedent dies without descendants, leaving no husband or widow, or father or mother, and no brother or sister, or their descendant, capable of succeeding to the property, it vests in the collaterals, as follows:

Collaterals of father and mother.

1. If it came to him on the paternal side, it vests in the nearest collaterals of the father, and the successors* of those who are deceased, according to the rules prescribed in the preceding section, in regard to relatives of equal and unequal degrees of consanguinity; and if there are no such collaterals of the father of the decedent, entitled to succeed, it vests in the nearest collaterals of the mother of the decedent, and the successors of those who are deceased, according to the same rules;

Collaterals of father, when preferred.

2. If it came to him on the maternal side, it vests in the nearest collateral relatives of the mother, and the successors of those who are deceased; and if there are no such collaterals of the mother, entitled to succeed, the property vests in the nearest collaterals of the father, and the successors of those deceased, according to the same rules;

Collaterals of mother, when preferred.

3. If the property came to the decedent, neither on the paternal nor the maternal side, it vests in the nearest collaterals of the father, and the successors of those deceased, and the nearest collaterals of the mother, and the successors of those deceased, according to the same rules;

When both succeed.

4. In all cases not otherwise provided for, the property vests according to the course of the common law.

Other cases.

1 R. S., 752, §§ 10, 11, 12, 13, 16.

§ 11. If any relative, entitled to succeed to the property of any person who dies intestate as to the whole of his property, has been

When advancement to be

* The word "representatives," or "personal representatives," is used in this Code, in its most common sense, to designate executors, administrators and collectors of a decedent's estate; and the word "successors" is therefore used in these provisions both, as in itself more appropriate than "representatives," and as avoiding confusion.

set off or deducted.

advanced by such intestate, directly, or by virtue of a beneficial power, or of a power in trust with a right of selection, real or personal property, or both, whether within or without this state, in view to a portion or settlement in life, and so expressed in the instrument of settlement or portion, the value thereof, as expressed in the instrument, is reckoned, for the purposes of this section only, as part of the property of such intestate to which his heirs and next of kin succeed, and if such advancement is equal or superior to the amount of the share, which such relative would be entitled to receive, of the property of the intestate, as above reckoned, then such relative and his successors have no share in the property of the intestate. But if the advancement is not equal to such share, such relative and his successors succeed to so much only of the property of the intestate, as is sufficient to make it equal to such share. An exclusion from succession, and an adjustment of shares under these provisions, take effect only upon judgment in an action in the Supreme Court.

Unless both the purpose and the value of such settlement or portion are expressed in the instrument of settlement, there is no legal advancement within the provisions of the preceding section.

From 1 R. S., 754, §§ 23, 24, 25; *Id.*, 757, § 127.

NOTE.—The provisions from which this section is taken, although in terms embracing the case of any intestate, apply only in cases of total intestacy. (Thompson *v.* Carmichael, 3 *Sandf. Ch.*, 120.) Questions of considerable embarrassment, which frequently arise in determining what is to be deemed an advancement, and what is to be taken as its value, have led the commissioners to insert the provision, that in order to constitute a settlement an advancement, within these provisions, its purpose and value must be expressed in the instrument.

There seems to be no sufficient reason why the succession should be interrupted or affected until the fact of the existence of the advancement, and its value, have been finally determined. Under the present provisions, so long as the question whether gifts made by the deceased were advancements or not is undetermined, the question as to who is entitled to take as heir, or in what shares the heirs take, is also in suspense. The commissioners have thought it better, therefore, for the setting of titles, to provide that the succession shall not be affected until a judgment is had, declaring the existence and extent of the advancement.

§ 12. [Take in those sections from the draft of the Civil Code, which relate to the nature of the tenancy of several heirs,—a saving clause as to limitations by deed or will,—trust estates,—part-

nership, real property, and protection of heir's grantee by a conveyance made when will has not been produced.]

§ 13. The terms as used in this article "living" and "having died" refer to the time of the death of the decedent; and the terms "where the property came to the decedent, on the paternal side," or "on the maternal side," include every case where it came to the intestate, by devise, gift, or succession, from the parent referred to, or from any relative of the blood of such parent. Terms "living" and "having died," "paternal side," &c.

1 R. S., 755, §§ 28, 29.

§ 14. [Take in section 514, from the draft of the Civil Code, abolishing Dower and Curtesy.]

## ARTICLE IV.

### SUCCESSION TO PERSONAL PROPERTY.

SECTION 15. Order of succession and personal property.
16. Husband.
17. Widow and children.
18. Widow and next of kin.
19. Widow alone.
20. Children alone.
21. Where there is neither widow nor children.
22. Relatives in equal degree.
23. In unequal degrees.
24. When advancement to be set off or deducted.
25. Law of domicil to govern.
26. "Next of kin."

§ 15. Personal property remaining after payment of debts, and, where the decedent left a will, after payment of bequests also, is to be distributed, together with any damages recovered by the personal representative for any wrongful act, neglect or default which caused the decedent's death, to the successors of the decedent as follows: Order of succession to personal property.

1. If the decedent leaves a husband, the whole surplus goes to him, notwithstanding it was the separate property of the wife, provided she did not, during the marriage, alienate such property, or effectually dispose of the same on her decease by will or by gift in view of death; Husband.

It seems to be settled that the Married Women's Acts of 1848 and 1849 do not affect the question of the succession to property left by a wife on her death (Ransom *v.* Nichols, 22 *N. Y.*, 110; see Vallance *v.* Bausch,

28 *Barb.*, 633.) The commissioners have therefore declared the rule as above, both in respect to personal property and in respect to real property and contrary thereto.

Widow and children.

2. If the decedent leaves a widow and lineal descendants, one-third part goes to the widow, and the other two-thirds to the nearest lineal descendants and the successors of those who are deceased;

Widow and next of kin.

3. If the decedent leaves a widow and no descendant, and leaves a parent, brother or sister, the whole surplus, if it does not exceed in value at the time of distribution ten thousand dollars, goes to the widow; if it exceeds ten thousand dollars, but does not exceed twenty thousand dollars, then ten thousand dollars,—if it exceeds twenty thousand dollars, then one-half goes to her. The remainder, if any, goes to the parents or either of them, if any, and if there are none, to the brothers and sisters or either of them;

Widow alone.

4. If the decedent leaves a widow and no descendant, parent, brother or sister, the whole surplus goes to the widow;

Children alone.

5. If the decedent leaves no widow, the whole surplus goes equally to the nearest lineal descendants and the successors of those who are deceased.

This and the following section are modified from 2 R. S., 96, § 75, as amended by Laws of 1845, ch. 236.

Where there is neither widow nor children.

§ 16. If there is no widow and no descendant, the whole surplus goes to the next of kin, and the successors of those who are deceased, as follows:

1. To the parents, or either of them;

2. If there is no parent, to the brothers and sisters, in equal shares, and the successors of those who are deceased;

3. If there is no parent or brother or sister, or successor of a brother or sister, then to the next of kin and the successors of those who are deceased.

The successors of a deceased parent cannot take by representation in his or her place.

Relatives in equal degree.

§ 17. Where the descendants or next of kin of the decedent, except parents, who are entitled to succeed, are all in equal degree of consanguinity to the decedent, their shares are equal; but if

In unequal degrees.

several are of unequal degree, each of the nearest degree succeeds to the share to which he would have been entitled had all those in the same degree, who have died leaving issue, been living; and

the issue of those who shall have died, respectively succeed to the shares which such descendants or next of kin would have received if living.

From 2 R. S., 97, § 75, subs. 9 and 10.

When advancement to be set off or deducted.

§ 18. If any relative, entitled to succeed to the personal property of a person dying intestate as to the whole of his property, has been advanced by such intestate, pursuant to the provisions of section 11 the value of such advancement must be reckoned with that part of the surplus of the personal property which remains to be distributed; and if such advancement equals the amount of the share, which such relative would be entitled to receive of the surplus, as thus reckoned, then he and his successors have no share in such surplus. But if the advancement is less than such share, he and his successors have so much only of the surplus as is sufficient to make it equal to such share.

From 2 R. S., 97, §§ 76, 77, 78, and see note to section above.

Law of domicil to govern.

§ 19. The law of the domicil of an intestate regulates the succession to his personal property.

"Next of kin."

§ 20. The term "next of kin," as used in this Code, includes only relatives by blood.

# APPENDIX B.

## PROCEEDINGS UPON COMPLAINTS BETWEEN MASTERS AND APPRENTICES.

[The following provisions relating to matters of Procedure, have been prepared in the preparation of the draft of the Civil Code; but are presented separately as being more appropriate for incorporation into the Code of Civil Procedure.]

SECTION 21. Apprentices, how compelled to serve.
22. Proceedings against, for misbehavior.
23. For misconduct of master, apprentices may be discharged.
24. Qualification of last three sections.

Apprentices, how compelled to serve.

§ 21. If an apprentice refuses to serve as required by his contract or indentures, or by law, a justice of the peace of the county, or the mayor, recorder, or any alderman of the city, may, on application of the master, compel him to appear by warrant or otherwise, and if such refusal is persisted in, may commit him by warrant to the bridewell, house of correction or common jail of the city or county, until he consents.

2 R. S., 159, § 29.

Proceedings against for misbehavior.

§ 22. Upon the sworn complaint of a master, any two justices of the peace of the county, or the mayor, recorder and aldermen of the city, or any two of them, may compel the appearance of an apprentice and examine and determine respecting any misbehavior of the latter; and if the complaint appears to be well founded, may by warrant commit the offender to the house of correction, or to the common jail of the county, for a term not exceeding one month, there to be employed in hard labor, and to be solitarily confined; or they may, by a certificate, discharge the offender from service and the master from all obligations to him.

2 R. S., 159, §§ 30, 31.

For misconduct of master, apprentices may be discharged.

§ 23. Upon complaint of any apprentice that the master is guilty of cruelty, misusage, refusal of necessary provision or clothing, or any other violation of the indenture or contract, or if the law towards such apprentice, any two of such officers may compel the appearance of the master, and examine and determine

the complaint, and by certificate under their hands discharge such person from his obligation of service.

2 R. S., 159, § 32.

Qualification of last three sections.

§ 24. The preceding three sections shall not extend to an apprentice whose master or mistress received, or is entitled to receive, any pecuniary compensation for his instruction; but in such case, a justice of the peace of the county, or any mayor, recorder, or alderman of the city, may, on complaint of either party, inquire into the matter, and make such order and direction as is just. If the difficulty cannot be reconciled, he must take a recognizance from the party complained of, to appear at the next court of sessions of the county, which court upon the hearing of the parties, may discharge the apprentice by order, may order the consideration of the indenture to be refunded, or securities therefor to be canceled, and may punish the apprentice, if guilty of misbehavior, as for a misdemeanor.

2 R. S., 159, §§ 34, 38.

# APPENDIX C.

## PROCEEDINGS IN SURROGATES' COURTS IN RESPECT TO GUARDIANS.

[To be inserted in the CODE OF CIVIL PROCEDURE.]

SECTION 1. Minors over 14, may apply to surrogate for guardian.
2. Any one on behalf of minor under 14 may apply.
3. Power of surrogate to inquire into nature of minor's estate.
4. Bond.
5. Action on bond.
6. Provisions respecting bonds of guardians.
7. Guardian to account annually.
8. Guardian may be compelled to render more full account.
9. Accounting, how required.
10. Guardians entitled to compensation.
11. Surrogate may discontinue proceedings against guardian for neglect.
12. Appeals from orders settling accounts.
13. Resignation of guardian.
14. New guardian to be appointed.
15. Appeals from orders respecting guardians.
16. Citations and orders, how served.

**Minors over 14 may apply to surrogate for guardian.**

§ 1. A minor of the age of fourteen years may petition the surrogate of the county where he resides, or, in case of a non-resident, the surrogate of the county where the property or a part thereof is situated, for the appointment of a general guardian. The minor may nominate the guardian subject to the approbation of the surrogate.

2 R. S., 150, § 4.

**Any one on behalf of minor under 14 may apply.**

§ 2. Any person, on behalf of a minor under fourteen, may petition the surrogate for the appointment of a general guardian, until he shall arrive at the age of fourteen years, and until another guardian shall be appointed. On such application, it is the duty of the surrogate to inform himself of the circumstances of the case, and for this purpose if the relatives of the child residing in the county, or some of them, be not present, he must assign a day for the hearing, and direct notice thereof to be given to such of the relatives and to such other persons, if any, as he deems it proper to notify.

2 R. S., 151, § 5, and Laws of 1837, ch. 460, § 44. Modified to conform to the decisions, which are to the effect

that the application should be by petition (Dutton v. Dutton, 8 *How. Pr.*, 99); that it is the duty of the surrogate to satisfy himself of the propriety of the proceeding (Underhill v. Dennis, 9 *Paige*, 202; White v. Pomeroy, 7 *Barb.*, 640); that the relatives of the infant are not summoned as parties to the proceeding; but merely to enable them to attend, if they think proper, for the purpose of giving the surrogate the requisite information as to the value of the infant's property, and as to the propriety of appointing the applicant the guardian of the infant (Kellinger v. Roe, 7 *Paige*, 362; Cozine v. Horn, 1 *Bradf.*, 143); that the surrogate has power to cite other persons besides relatives (*Ex parte* Dawson, 3 *Bradf.*, 130); and that he may proceed to a hearing on the day the petition is presented, if he determines that notice to the relatives need not be given (People v. Wilcox, 22 *Barb.*, 178).

**Power of surrogate to inquire into nature of minor's estate.**

§ 3. Upon such applications the surrogate has the same power to appoint guardians as the supreme court. It is his duty to inquire into the circumstances of the minor, and ascertain the amount of his personal property, and the value of the rents and profits of his real property.

From 2 R. S., 151, § 6. The clause relating to the power to cite witnesses is omitted, because embraced in subsequent general provisions.

**Bond.**

§ 4. Before appointment, every such guardian must execute, and file with the surrogate, a bond to the minor, with two or more sufficient sureties, to be approved by the surrogate, and to be jointly and severally bound in a penalty of not less than twice the value of the personal property, and of the value of the rents and profits of the real property. The bond must be conditioned that the guardian will faithfully, in all things, discharge the trust reposed in him as such, and obey all lawful orders of the surrogate touching the trust, and that he will render a true and just account of all moneys and property received by him, and of the application thereof, and of his guardianship in all respects, to any court having cognizance thereof, when thereunto required.

From 2 R. S., 151, § 8. Modified in details in conformity to the provisions as to bonds of executors, administrators, &c.

§ 29. In case of a breach of the condition an action may be brought upon it when the surrogate so directs, *by the guardian's successor, if any has been appointed, if none, then by the ward.* Action on bond.

2 R. S., 151, § 9. Modified by adding the words in italics.

§ 30. The provisions of sections of this Code, in reference to the deposit of securities with the surrogate in part to supply the place of security by bond where the estate is large; in reference to requiring a new bond or new sureties; to releasing sureties; to revocation of appointment for failure to comply; and to revocation of appointment on the ground of misconduct or disqualification, apply to the case of guardians appointed by a surrogate. Provisions respecting bonds of guardians.

The provisions here referred to substantially correspond to those of 2 R. S., 152, §§ 14, 16; Laws of 1837, 532, ch. 460, §§ 46, 47, 48; same stat., 3 R. S., 5th ed., 246, § 24, for which they are substituted.

§ 31. Every general guardian appointed by a surrogate must annually, after his appointment, so long as any of the estate remains in his control, file in the office of such surrogate, an inventory and account, under oath of his guardianship, and of the amount of property received by him and remaining in his hands, or invested by him, and the manner and nature of such investment, and his receipts and disbursements, in form of debtor and creditor. The surrogate must annex a copy of this section to every instrument of appointment of a guardian given by him. Guardian to account annually.

Laws of 1837, 534, ch. 460, § 57, same stat., 3 R. S., 5th ed., 247, § 35.

§ 32. In the month of February in each year, each surrogate must examine all accounts and inventories filed during the preceding year, and if any guardian has omitted to account, or has rendered an insufficient and unsatisfactory account, he must compel a full and sufficient account. Guardian may be compelled to render more full account.

Laws of 1837, ch. 460, § 60; same stat., 3 R. S., 5th ed., 248, § 37.

§ 33. Accountings by any guardian, appointed by a surrogate, may be had in the following cases: Accountings, how required.

1. After the ward's arrival at full age, by citation issued by the surrogate;

2. During the ward's minority, by order to show cause, issued on the application of the ward or any relative;

2 R. S., 152, § 11.

3. After the ward has arrived at full age, or the guardian has been superseded in his trust, by citation issued on the application to the ward or to the new guardian;

4. On application of any surety, upon the guardian's bond, or of the legal representatives of such surety;

5. By the surrogate in his discretion at any time.

2 R. S., 152, § 12.

Subdivisions 4 and 5 are new.

Guardians entitled to compensation.

§ 34. Guardians are entitled to compensation and reimbursement of expenses, in like manner with executors and administrators, according to section of this Code.

2 R. S., 153, § 22.

Surrogate may discontinue proceedings against guardian for neglect.

§ 35. The surrogate may discontinue proceedings taken by him to compel an account, on payment of all costs which have accrued in consequence of the guardian's neglect.

Laws of 1837, ch. 460, § 60; same stat., 3 R. S., 5th ed., 248, § 37.

Appeals from orders settling accounts.

§ 36. Appeals from the final order of the surrogate, on the settlement of a guardian's account, may be made to the supreme court, in the same manner and time, and with the same effect, as in the case of administrators.

2 R. S., 152, § 13.

Resignation of guardian.

§ 37. On the verified petition of a guardian setting forth his reasons for wishing to resign, the surrogate who appointed him may, in his discretion, by order, require the ward and his next of kin, if any there are of full age within the county, to show cause why the resignation should not be accepted, and on due service thereof, and after appointing some discreet and competent person to appear and attend to the ward's interests, who shall consent in writing to such appointment, and hearing any persons who may desire to be heard on behalf of the ward, and receiving from the guardian a full account according to section , the surrogate may, in his discretion, and if satisfied that the guardian has been faithful and has truly accounted, proceed as hereinbefore prescribed, to appoint a new guardian upon such conditions as he shall judge proper for the security of the estate, and order a delivery of the property and papers accordingly, requiring the guardian to take duplicate receipts therefor; and, on one of such receipts being filed with the surrogate, he may accept the resignation of the guardian, and discharge him from the trust. But the guardian so discharged

and his sureties are still liable in relation to all matters connected with the trust before the resignation.

Laws of 1837, ch. 460, §§ 51–56; 2 R. S., 5th ed., 246, §§ 29–34.

New guardian to be appointed.

§ 38. On removing a guardian, the surrogate may proceed to appoint a new one, in the same manner as if none had been appointed.

2 R. S., 153, § 17.

Appeals from orders respecting guardians.

§ 39. Within six months after an order made by a surrogate appointing or removing or refusing to remove a guardian, any person interested, or the guardian removed, may appeal to the supreme court, which may make such order for notifying the adverse party, and for correcting any such proceedings, as may be just. But no appeal by a guardian from the order of a surrogate removing him may in any wise affect such order, until the same is reversed.

2 R. S., 153, §§ 18, 19.

Citations and orders, how served.

§ 40. Citations and orders are to be served in the mode prescribed by section of this Code.

This modifies the time and mode of serving the citation from that prescribed by 2 R. S., 152, § 15; Laws of 1837, 532, chap. 460, § 45; but secures uniformity of practice.

# APPENDIX D.

## ROCEEDINGS RELATING TO THE ESTATES OF DECEASED PERSONS.

[To be inserted in the Code of Civil Procedure.]

CHAPTER I. The settlement of the estates of deceased persons.

II. Liability of heirs, devisees, legatees and others, for debts of the decedent.

III. The surrogate's court, and proceedings therein.

IV. Appeals.

NOTE.—The Commissioners here present the entire body of the existing statutory law of the state, relative to proceedings in settlement of the estates of deceased persons, collated from the Revised Statutes and the Session Laws, with such modifications and additions as will tend, in their judgment, to the improvement and simplification of the system. General principles established by judicial decisions have been incorporated, and in some cases where the rule was uncertain, it has been expressly settled. The portion of the Revised Statutes relating to this branch of the law has been the subject of frequent legislation, and the congruity of the system has been so materially impaired that a new revision would seem to be a work of great public utility. Care has been taken to make no change when the propriety was not clearly indicated.

More certainty is given to titles derived from heirs and devisees by limiting the duration of liens of creditors, and requiring notice of the probate of a will to be filed with the County Clerk. Provisions are inserted relating to the probate of wills, giving it the same effect over real as over personal estate; the sale of real estate; the powers of executors, administrators, testamentary trustees and collectors; the supervision of their conduct and accounts. These are some of the important topics which have been in many respects the subjects of changes and additions. The notes to the sections explain which are new or modified, and the sources from which those embodying the existing law are taken.

## CHAPTER I.

### THE SETTLEMENT OF THE ESTATES OF DECEASED PERSONS.

ARTICLE I. Jurisdiction of surrogates over estates of deceased persons.
II. Probate.
III. Allegations.
IV. Letters testamentary.
V. Letters of administration with the will annexed.
VI. Letters of administration.
VII. Letters of collection.
VIII. General provisions as to letters.
IX. Assets and inventories.
X. Payment of debts and legacies, and distribution of surplus.
XI. Accounting.
XII. Powers and duties of executors and administrators.
XIII. Sale of real property for payment of debts.

## ARTICLE I.

### JURISDICTION OF SURROGATES OVER ESTATES OF DECEASED PERSONS.

SECTION 1. What surrogate has jurisdiction of the estate.
2. Surrogate first acquiring jurisdiction to have exclusive jurisdiction.

When surrogate has jurisdiction of the estate of a deceased person.

§ 1. The surrogate of each county has sole and exclusive jurisdiction within his county to take the proof of wills and to grant letters testamentary, letters of administration with the will annexed and in cases of intestacy, in the following cases:

1. Where the decedent at, or immediately previous to, his death, was an inhabitant of the county of such surrogate, in whatever place such death may have happened;

2. Where the decedent, not being an inhabitant of this state, died in the county of such surrogate, leaving assets in the state, or assets of such decedent thereafter come into the state;

3. Where the decedent, not being an inhabitant of this state, died out of the state, leaving assets in the county of such surro-

gate, or assets of such decedent thereafter come into the county of such surrogate;

4. Where no surrogate has gained jurisdiction under either of the preceding clauses, and any real property, belonging to such decedent at the time of his death, is situated in the county of such surrogate.

In the cases provided under subdivisions 3 and 4, the surrogate who first exercises jurisdiction, thereby acquires sole and exclusive jurisdiction over the decedent's estate.

Laws of 1837, 460, § 1; same stat., 2 R. S., 5th ed., 362, § 2.

Surrogate first acquiring jurisdiction to have exclusive jurisdiction

§ 2. Where a surrogate has acquired jurisdiction, he has exclusive jurisdiction over the personal representatives, and the power of granting letters testamentary, and of administration with the will annexed, and of administration, together with all other powers granted to surrogates in relation to the estates of deceased persons, by the provisions of this Code.

2 R. S., 223, § 12.

## ARTICLE II.

### PROBATE.

SECTION 1. Who may apply for probate.
2. What to be shown on application.
3. Citation to attend probate.
4. Proof of service; further citation.
5. Witnesses, how examined.
6. What witnesses.
7. When all the witnesses to be examined.
8. Certain witnesses indispensable.
9. Proof of handwriting.
10. Proof of lost or destroyed will.
11. Proof by exemplified copy of foreign record.
12. Proof by commission.
13. Will to be recorded.
14. Surrogate to enter in his minutes his decision.
15. Probate, how far conclusive.
16. Proved will may be read in evidence.
17. Records of former court of probate.
18. Records of wills proved in chancery or supreme court.
19. Recording exemplified copies in different counties.
20. Wills, when and to whom to be returned.

Who may apply for probate.

§ 3. Any executor, devisee or legatee named in any will, or any other person interested in the estate, may at any time after

the death of the testator, apply to the surrogate having jurisdiction, to have the will proved, whether the same is in writing, in his possession or not, or is lost or destroyed, or beyond the jurisdiction of the state, or a nuncupative will.

From Laws of 1837, ch. 460, § 4; same statute in 3 R. S., 5th ed., 146, *§ 49.

What to be shown on application.

§ 4. On application to the surrogate, he must ascertain:

1. The names and residence of all parties who would be entitled to succeed to property of the decedent, under the provisions of the Civil Code, or that upon diligent inquiry the same cannot be ascertained;

2. Which of the parties in interest are minors, and the names and residence of their general guardians. If there is no general guardian within this state, the surrogate must, by order, appoint a special guardian for such minor, to act in the proceeding, whose written consent to serve must be filed with the surrogate. The testamentary guardian named in the will to be proved, cannot for this purpose be deemed a general guardian, and cannot be appointed special guardian.

Laws of 1837, ch. 460, §§ 5, 6; same stat., 3 R. S., 5th ed., 146, *§§ 50, 51.

Citation to probate.

§ 5. The surrogate must thereupon issue a citation, requiring the parties in interest, at a time and place therein mentioned, to appear and attend the probate. The citation must state who has applied for the probate, and whether the will relates exclusively to either real or personal property, or to both. It must be directed to the parties in interest by name, stating their residence, or if any of them are minors, to their guardians, by name, stating their residence; and if the name or residence of any party in interest, or guardian, cannot be ascertained, such fact must also be stated. If it is not shown to the surrogate by affidavit of the applicant, or other written proof, that the decedent left surviving him, heirs, husband, widow or next of kin, the citation must be directed to the attorney-general.

Laws of 1837, ch. 460, § 7; same stat., 3 R. S., 5th ed., 147, *§ 52. The latter provision is adopted from 2 R. S., 76, § 37.

Proof of service.

§ 6. Before proceeding to take the proof of any will, the surrogate must require satisfactory evidence, by affidavit, of the due service of the citation. If the same has not been duly served on

all the parties in interest, the surrogate may adjourn the proceedings and issue a further citation for the purpose of bringing in such parties.

Further citation.

Laws of 1837, ch. 460, § 9; same Stat., 3 R. S., 5th ed., 148, *§ 55.

§ 7. Upon proof made of the due service of the citation, the surrogate must cause the witnesses to be examined before him, and take the proofs and examinations in writing, which must be subscribed by the witnesses and certified by the surrogate.

Witnesses, how examined.

Laws of 1837, ch. 460, § 10, first clause; same stat., in 3 R. S., 5th ed., 148, § 56.

§ 8. Two at least of the witnesses to the will, if so many are living in this state, and of sound mind and competent to testify, and are not disabled from sickness, age or infirmity from attending, must be produced and examined; and the death, absence, incompetence, insanity, sickness or other infirmity of any of them, must be satisfactorily shown to the surrogate.

What witnesses.

Laws of 1837, ch. 460, § 10, latter clauses; same Stat., 3 R. S., 249, *§ 54.

§ 9. If any party in interest requests all the witnesses to such will, or any other witness whose testimony the surrogate is satisfied is material, if living in this state, and of sound mind and competent to testify, and not disabled from age, sickness or infirmity from attending, must be produced and examined; and the death, absence, incompetence, insanity, sickness or other infirmity of any of them, must be satisfactorily shown to the surrogate before taking such proof without them. But the surrogate must examine an aged, sick or infirm witness, or cause the examination to be made by another surrogate, as directed by the provisions of this Code, relating to proceedings in surrogates' courts.

When all the witnesses to be examined.

From Laws of 1837, ch. 460, § 11; same stat., 3 R. S., 5th ed., 148, *57, as amended by Laws of 1841, ch. 129, § 11; same stat., 3 R. S., 5th ed., 149, *§ 63.

§ 10. No will can be deemed proved, until the witnesses to the same, residing within this state at the time of such proof, of sound mind and competent to testify, have been examined; and in all cases the oath of the person who received the will from the testator, if he can be produced, together with the oath of the person presenting the same for probate, stating the circumstances of the execution, the delivery and the possession thereof may be required. The surrogate may also examine the parties propound-

Certain witnesses indispensable

ing the will, and the parties in interest and any other person, as to the existence or destruction of any other testamentary paper; and before recording any will, or admitting the same to probate, he must inquire particularly into the facts and circumstances, and must be satisfied of its genuineness and validity.

Laws of 1837, ch. 460, § 17, § 10, last clause; same stat. 3 R. S., 5th ed., 142, §§ 62.

Proof of handwriting.

§ 11. When any one or more of the subscribing witnesses to such will are dead, or reside out of the state, or are insane or incompetent to testify, then such proof must be taken of the handwriting of the testator, and of the witness or witnesses so dead, absent, incompetent or insane, and of such other circumstances, as would be sufficient to prove such will on the trial of a civil action.

2 R. S., 56, § 12.

Proof of lost or destroyed will.

§ 12. When a will is lost or destroyed by accident or design, the surrogate has power to take proof of the execution and validity thereof, and to establish the same; but it cannot be admitted to probate unless proved to have been in existence at the death of the testator, or to have been accidentally or fraudulently destroyed in his lifetime, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being deemed equivalent to one witness.

Proof by exemplified copy of foreign record.

§ 13. The will of a person residing out of this state which has been duly admitted to probate in the state or country where he was domiciled, must be admitted to probate as a will of personal property, upon the production of a duly exemplified or authenticated copy of such will and probate, under the seal of the court in which the same was proved, and as a will of real property whenever the proofs show that it was executed in conformity to the laws of this state.

Proof by commission.

§ 14. A will, whether in writing, and in possession of the applicant for probate, or lost, or destroyed, or without the state, or a will, the witnesses whereto reside without the state, or a nuncupative will, may be proved upon commission to be issued by the surrogate having jurisdiction. The commissioner must take the proofs and examinations in writing, which must be subscribed by the witnesses and certified by the commissioner.

Modified from 2 R. S., 67, § 63.

§ 15. If it appears to the surrogate, from the proofs duly taken in any of the modes hereinbefore prescribed, that the will was duly executed, and is valid as the last will and testament of the testator, it must be admitted to probate, and together with the proofs and examinations so taken must be recorded in a book to be provided by the surrogate, as a will of real or personal property, or both; and the record thereof certified by him. If the will is denied probate, the proofs and examinations must be entered in the surrogate's minutes.

**Will, when to be recorded.**

From 2 R. S., 58, § 14; as amended, Laws of 1837, ch. 460, § 18; same stat. in 3 R. S., 5th ed., 150, § 67.

§ 16. The surrogate must enter in his minutes his decision concerning the sufficiency of the proof, or the validity, of any will offered for probate; and in case he decides against the sufficiency of the proof, or the validity, of any such will, he must, without fee or charge, state the grounds upon which the decision is made, if required by either party.

**Surrogate to enter in his minutes his decision**

Laws of 1837, ch. 460, § 22; same stat., 3 R. S., 5th ed., 150, § 69.

§ 17. Such record and probate, whether the will is a will of real or personal property, or both, is conclusive evidence of the validity of the will, until it is reversed on appeal, or revoked by the surrogate, or the will is declared void by a competent tribunal.

**Probate, how far conclusive.**

2 R. S. 61, § 29; extended to include wills of real property.

§ 18. Every will, so proved, must have a certificate of such proof indorsed upon the original will, or upon the exemplified copy or other proof of its contents, which is admitted to probate, signed by the surrogate, and attested by his seal of office, and may be read in evidence without further proof thereof. The record of such will, so made, and the exemplification of such will by the surrogate, in whose custody the same may be, must be received in evidence, and has the same effect in all cases as the original will would have, if produced and proved.

**Proved will may be read in evidence.**

2 R. S., 58, § 15; as amended, Laws of 1837, ch. 460, § 18; same stat., 3 R. S., 5th ed., 150, § 67.

§ 19. The exemplification of the record of any last will and testament, proved before the judge of the former court of probates, and recorded in his office, before the first day of January, one thousand seven hundred and eighty-five, certified under the seal of the officer in whose custody such record may be, must be received in evidence in all cases, after it has been made to

**Record of former court of probate.**

appear that diligent and fruitless search has been made for the original will.

2 R. S., 58, § 20.

Records of wills proved in chancery or supreme court.

§ 20. Every will or copy proved by commission issued out of the late court of chancery, or out of the supreme court before the time at which this Code takes effect, must have a certificate of such proof indorsed thereon, signed by the clerk, and attested by the seal of the court, and may then be read in evidence without further proof thereof; and every record so made, or an exemplification thereof, must be received in evidence, and has the same effect in all cases as the original will would have, if produced and proved, and may in like manner be repelled by contrary proof.

From 2 R. S., 67, § 66.

Recording exemplified copies in different counties.

§ 21. The clerks of the supreme court, and the surrogates of the several counties, may make exemplified copies of any will, proved in their respective courts, together with all the notices, citations and proofs relating to the same, and such exemplified copies may be recorded in the book kept for recording wills, by the surrogate of any county in which any real property of the testator is situated.

Laws of 1837, ch. 460, § 66.

Wills, when and to whom to be returned.

§ 22. All wills, whenever proved according to law, except such as are required to be deposited, must, after being recorded, be returned upon demand to the person who delivered the same, or in case of his death, insanity or removal from the state, to any devisee named in such will, or to the heirs or assigns of such devisee; or if the same relate to personal estate only, to any acting executor of such will, or administrator with the will annexed, or to a legatee named therein.

2 R. S., 66, § 54.

## ARTICLE III.

### ALLEGATIONS.

SECTION 23. Contesting on allegations after probate.
24. Issuing citation.
25. Proceedings on the return.
26. Executor, &c., to suspend his proceedings.
27. Determination of the proceedings.
28. Notice of revocation.
29. Executor, &c., to account.

Contesting on allegations after probate.

§ 23. Notwithstanding a will may have been admitted to probate, any party in interest may, at any time within one year after probate, file in the office of the surrogate who admitted the will to probate, his allegations in writing, against the competency of the proof.

2 R. S., 61, §§ 30, 31.

Issuing citation.

§ 24. The surrogate must then issue a citation to the personal representatives, and to all the devisees and legatees named in the will, residing in this state, or their guardians, if any of them are minors, or their successors, if any of them are dead, requiring them to appear at his office, to sustain the probate of such will.

2 R. S., 61, § 32.

Proceedings on the return.

§ 25. At the time appointed, the surrogate must proceed as in the case of an original probate, to hear the proofs, after due proof is made of the service of the citation. If any legatees or devisees named in the will contested are minors, and have no general guardian within the state, he must appoint guardians to take care of their interests in the controversy, as provided in section 4 of this Code.

All the provisions in relation to the examination of witnesses within or without the state, in proceedings for an original probate, apply to proofs on allegations.

2 R. S., 62, § 34.

Executor, &c., to suspend his proceedings.

§ 26. After the service of the citation, the personal representatives must suspend all proceedings in relation to the estate of the testator, except the preservation of the property, the collection and recovery of moneys, the payment of debts, and such other acts as may be directed by the surrogate, until a decision is had in the proceeding.

2 R. S., 62, § 33.

Determination of the proceeding.

§ 27. If, upon hearing the proofs, the surrogate decides that such will is not sufficiently proved to have been the last will and testament of the testator, he must revoke the probate thereof; if otherwise, he must confirm such probate. Upon any such hearing before the surrogate, the depositions of witnesses taken on the probate, and who may be dead, insane, or incompetent, may be received in evidence.

2 R. S., 62, §§ 35, 36.

Notice of revocation.

§ 28. If the surrogate revokes the probate, he must record and certify the revocation in the same manner as a probate; and cause notice to be served immediately upon the personal representatives, and to be published for three weeks in a newspaper printed in the county, if there is one.

2 R. S., 62, § 37.

Executor, &c., to account.

§ 29. The powers of the personal representatives cease, upon being served with such notice; and they must account to the successors of the decedent for all property received by them. But they are not liable for any act done by them in good faith, previous to the service upon them of the citation, nor for any act mentioned in section 26 done in good faith, previous to the service of the notice of revocation.

2 R. S., 62, § 38.

## ARTICLE IV.

### LETTERS TESTAMENTARY.

SECTION 30. Surrogate may grant letters.
31. Who is disqualified to serve as executor.
32. Surrogate to inquire into objections, and in certain cases to require bond.
33. Bond by representative suing for act causing decedent's death.
34. Married women.
35. Renunciation, revocation thereof.
36. Order to show cause why executor should not be deemed to have renounced.

Surrogate may grant letters.

§ 30. The surrogate who has admitted a will to probate may, at any time after the will is proved, grant letters testamentary thereon to the executors named therein, who are competent by law to serve, and who appear and qualify, unless some party interested in the estate makes affidavit stating that he is advised and believes that there are just and substantial objections to granting such letters to one or more of the executors, and that he

intends to file such objections; whereupon the surrogate must, upon the filing of the affidavit, stay the granting of letters testamentary at least thirty days, unless the matter be sooner disposed of.

2 R. S., 69, § 1; and Laws of 1837, 460, § 22.

Who is disqualified to serve as executor.

§ 31. The surrogate may not issue letters testamentary to any person who, at the time of applying to qualify, is:

1. Under the age of twenty-one years;

2. An alien, being, or about to become, a non-resident of this state;

3. A person who has been convicted of an infamous crime;

4. Who, upon proof, is adjudged by the surrogate incompetent to execute the duties of such trust, by reason of drunkenness, improvidence or want of understanding;

5. Who fails to take the oath, or to file the consent prescribed by law, or give the bond which may be required by the surrogate, as hereinafter provided;

6. Who has renounced, and has not duly retracted his renunciation, as hereinafter provided.

2 R. S., 69, § 3; as amended, Laws of 1830, 230, § 17.

Surrogate to inquire into objections.

§ 32. If objections are made, by any person interested in the estate, against granting letters to one or more of the executors named in the will, the surrogate must inquire into the same; and if they are found valid, letters shall not be issued to such person, except that if the only valid objection is that such person is, or is about to become, a non-resident of this state, or that his circumstances would not, in the opinion of the surrogate, afford adequate security for the due administration of the estate, he must grant letters testamentary to such person, upon his giving a bond, as required by section 57, within a reasonable time. A testator has no power to dispense with the security which may be required by the surrogate under this section.

And in certain cases to require bond.

2 R. S., 70, §§ 6, 7. The last provision is new.

Bond by representative suing for act causing decedent's death

§ 33. Where a personal representative brings an action under section , the surrogate may, in his discretion, require him to give a bond for the faithful discharge of his duty in the collection and distribution of such demand, in addition to the bonds required by other provisions of this title. The provisions of sections 58, 59, 60 and 61 apply to bonds required under this section.

Married women.

§ 34. No letters testamentary may be issued to a married woman unless her husband consents thereto; and if an executrix marries, the surrogate must revoke her letters on objection of any party interested, unless her husband consents to her acting. Such consent must be by a writing to be filed with the surrogate; and on giving it they are both jointly responsible as executors.

2 R. S., 69, § 4. Perhaps this and similar sections are no longer appropriate under the amendment of the law relating to married women.

Renunciation.

Revocation thereof.

§ 35. Any person appointed executor may renounce the office by a writing, to be signed by him and attested by one witness, and on the same being proved to the satisfaction of the surrogate it shall be filed and recorded. Such renunciation may be retracted by a writing, executed, proved, filed and recorded, in a similar manner, at any time before letters testamentary or of administration with the will annexed have been issued, or after they have been issued, if there is no acting executor or administrator, and the administration of the estate is not completed; and thereupon letters testamentary may be issued to such person.

The first provision of this section is from 2 R. S., 70, § 8. The latter is new.

Order to show cause why executor should not be deemed to have renounced.

§ 36. If any person appointed executor does not qualify or renounce within thirty days after the will is admitted to probate, the surrogate shall, upon application of any other executor, or any party interested, issue an order to such person to show cause why he should not be deemed to have renounced. If upon due service he does not qualify, within such time as is allowed by the surrogate, an order must be entered decreeing that such person has renounced his appointment as executor. Such order may be revoked by the surrogate at any time before letters testamentary or of administration, with the will annexed, have been issued, or after they have been issued, if there is no acting executor or administrator, and the administration of the estate is not completed; and thereupon letters testamentary may be issued to such person.

2 R. S., 70, §§ 9, 12. Extended to allow a revocation after issue of letters.

## ARTICLE V.

### LETTERS OF ADMINISTRATION WITH THE WILL ANNEXED.

SECTION 37. When may be issued, and to whom.
38. Foreign will.
39. Married woman.
40. Further provisions.
41. Powers of administrator, with the will annexed.

**When may be issued, and to whom.**

§ 37. If there are no executors appointed in the will, or if, at any time, by reason of death, incompetency adjudged by the surrogate, renunciation, actual or decreed, or revocation, there is no executor or administrator, with the will annexed, qualified to act, the surrogate may issue letters of administration, with the will annexed, to the residuary legatees or some one of them, if there are any; if there are none that will accept, then to any principal or specific legatee, if there is any; if there is none that will accept, then to the husband, widow, next of kin, or creditors, or their guardian, if they are minors, in the same manner, and under the like regulations and restrictions as letters of administration in case of intestacy.

2 R. S., 71, § 14.

**Foreign will.**

§ 38. Letters of administration with the will annexed, must be granted to the attorney in fact of the executors or of the administrators, with the will annexed, of a foreign will, who has duly qualified, in preference to any other person.

This section is new, but conformable to the practice.

**Married woman**

§ 39. Where a married woman is entitled to letters of administration with the will annexed, they may be granted to her husband and herself, or to her husband alone, with her consent; but not to her alone. If an administratrix with the will annexed marries, the surrogate must, on objection of any party interested, revoke her letters, unless the husband takes out supplementary letters.

From 2 R. S., 75, § 32, as amended; Laws of 1830, ch. 320, § 18; 3 R. S., 5th ed., 159, § 32. See note to § 34.

**Further provisions.**

§ 40. The provisions contained in sections 49, 50, and 51, as to joining persons not entitled to renunciation, to citation of persons having prior right, to citation of the attorney-general, and to

the action of the surrogate thereon, apply to applications for letters of administration, with the will annexed.

Powers of administrator with the will annexed.

§ 41. In all cases where letters of administration, with the will annexed, are granted, the will of the deceased must be observed and performed by the administrators with the will annexed, both in respect to real and personal property; and the administrators, with the will annexed, have all the rights and powers, and are subject to the same duties, in respect to such property, real and personal, as if they had been named executors in the will.

2 R. S., 72, § 22. This section is modified so as to settle the question of power, with respect to real property.

## ARTICLE VI.

### LETTERS OF ADMINISTRATION.

SECTION 42. Who may apply for.
43. What to be shown on the application.
44. Who is entitled to letters.
45. Preference between several who are entitled.
46. Married woman.
47. Foreign administrator or his attorney in fact.
48. Disqualification.
49. Joining persons not entitled.
50. Renunciation.
51. Attorney-general to be cited, when.
52. Administrator first appointed, in certain cases, to have sole power.

Who may apply for.

§ 42. Any of the persons mentioned in section 44, may, at any time after the death of an intestate, apply to the surrogate having jurisdiction for the issue of letters of administration.

2 R. S., 74.

What to be shown on the application.

§ 43. On application to the surrogate, he must ascertain to his satisfaction the fact of the death of the decedent, and his intestacy. He must examine the applicant, on oath, touching the time, place and manner of the intestate's death, and whether or not he left a will. He may also examine any person, as to the existence or destruction of any testamentary paper.

From 2 R. S., 74, § 26.

Who is entitled to letters.

§ 44. Letters of administration, in case of intestacy, shall be granted to those who are entitled to succeed to the property of

the decedent, and to creditors, if they or any of them are competent and will accept the same, or to the public administrator, or other persons, in the following order:

1. To the husband or widow;

2. The children;

3. The grandchildren;

4. The father;

5. The brothers;

6. The sisters;

7. The next of kin, who are entitled to succeed to the personal property; in the order of their degree, where they are of different degrees;

8. The creditors, or other persons interested; in the order of their application for letters;

9. Any other person or persons legally competent. But the public administrator is to have preference next after those mentioned in subdivision 8, over all other persons; and in the county of New York, the public administrator is to have preference next after those mentioned in subdivision 7, over creditors and all other persons. But letters are to be granted to the attorney in fact of a person entitled to succeed, in preference to a public administrator.

If any of the persons entitled to letters are minors, letters are to be granted to their guardians.

2 R. S., 74, § 27.

**Preferences between several who are entitled.**

§ 45. When there are several persons equally entitled to administration, the surrogate may, in his discretion, grant letters to one or more of such persons, except that relatives of the whole blood are to be preferred to those of the half blood, and males and unmarried women are to be preferred to married women.

Modified from 2 R. S., 74, § 28.

**Married woman.**

§ 46. Where a married woman is entitled to letters of administration, they may be granted to her husband and herself, or to her husband alone with her consent; but not to her alone. If an administratrix marries, the surrogate must, on objection of any party interested, revoke her letters, unless the husband takes out supplementary letters.

2 R. S., 75, § 32, as amended by Laws of 1860, ch. 320, § 18; 3 R. S., 5th ed., 159, § 32. See note to § 34, *ante*.

**Foreign administrator or his**

§ 47. If the intestate was not an inhabitant of this state, and if no application for letters of administration is made by a relative

Attorney in fact.

entitled thereto, and legally competent, and it appears that letters of administration have been granted, by competent authority, in the state or country where the intestate was an inhabitant, then the person so appointed or his attorney in fact, on producing such letters, is entitled to letters of administration in preference to all other persons.

From 2 R. S., 75, § 31.

Disqualification.

§ 48. The surrogate may not issue letters of administration to any person who, at the time of appearing to qualify, is:

1. Under the age of twenty-one years;

2. An alien, who is, or is about to become, a non-resident of this state;

3. A person who has been convicted of an infamous crime;

4. Who, upon proof, is adjudged by the surrogate incompetent to execute the duties of such trust, by reason of drunkenness, improvidence or want of understanding;

5. Who fails to take the oath, or file the consent, or give the bond prescribed by law, or required by the surrogate, as hereinafter provided.

From 2 R. S., 75, § 32, as amended by Laws of 1830, ch. 320, § 18; 3 R. S., 5th ed., 159, § 32.

Joining persons not entitled.

§ 49. With the consent of the persons who are entitled, letters of administration may be granted to one or more competent persons who are not entitled, jointly with those who are entitled. Such consent must be in writing, and must be filed in the office of the surrogate.

2 R. S., 76, § 34.

Renunciation of persons having prior right.

§ 50. When any person applies for administration, and any other person has prior right to such administration, a written renunciation of the persons having such prior right must be proved and filed with the surrogate, or an order must be issued to all persons having such prior right to show cause why administration should not be granted to such applicant.

2 R. S., 76, § 35.

Attorney-general to be cited, when.

§ 51. An order to show cause, as aforesaid, must be issued to the attorney-general, unless it is shown to the surrogate, by the affidavit of the applicant, or other written proof, that the intestate left persons entitled to his property, specifying their names and residence, as far as the same can be ascertained.

2 R. S., 76, § 37.

§ 52. The persons appointed administrators, by the surrogate who first grants letters of administration in the cases provided by subdivisions 3 and 4 of section 1, have, until a revocation of their letters, sole and exclusive authority as such, and are entitled to demand and recover from any person subsequently appointed administrator of the same estate the property of the decedent in his hands. But all acts, in good faith, of such subsequent administrator, done before notice of such previous letters, are valid; and all actions brought by or against him may be continued by or against the first administrators.

Administrators first appointed in certain cases to have sole power.

2 R. S., 74, § 25.

## ARTICLE VII.

### LETTERS OF COLLECTION.

SECTION 53. When may be issued.
54. Powers of collector.
55. Termination of his power, and his duty thereupon.

§ 53. Whenever, for any reason, a delay is necessarily produced in the admission of a will to probate, or in granting letters testamentary, letters of administration, or letters of administration with the will annexed, the surrogate may issue, to some person or persons not disqualified to serve as administrator, letters of collection, authorizing the preservation and collection of the property of the decedent.

When may be issued.

Laws of 1837, ch. 460, § 23; same stat., 3 R. S., 5th ed., 160, § 38.

§ 54. Every collector appointed under the preceding section has authority to collect the personal property of the decedent, take possession and receive the rents and profits of the real property, and preserve and secure the estate, at such reasonable expense as the surrogate may allow; and for these purposes he may maintain and defend any civil proceedings. He may be sued for debts due by the decedent. Under direction of the surrogate, he may sell the [real and] personal property of the decedent, for the preservation and benefit of the estate, after the same has been appraised; and pay funeral expenses and debts and make such other payments as may be directed by the surrogate.

Powers of collector.

Modified from Laws of 1837, ch. 460, § 24; same stat., 3 R. S., 5th ed., 161, § 39. The words in brackets should be omitted if appendix A is substituted for the text of the Civil Code.

Termination of his power, and his duty thereupon.

§ 55. When letters testamentary, or letters of administration or of administration with the will annexed, are granted, the powers of such collector cease; but any suit brought by him may be continued by his successor, the executor or administrator, in his own name. Such collector must, on demand, deliver to his successor, the executor or administrator, all the property of the decedent under his control, and render an account, on oath, to the surrogate, of all his proceedings. Such delivery and account may be enforced by citation, order, and attachment.

2 R. S., 77, § 40.

## ARTICLE VIII.

### GENERAL PROVISIONS AS TO LETTERS TESTAMENTARY, OF ADMINISTRATION WITH WILL ANNEXED, OF ADMINISTRATION AND OF COLLECTION.

SECTION 56. Oath.
57. Bond.
58. Deposit of securities.
59. Requiring new bond or new sureties.
60. Releasing sureties.
61. Revocation of letters for failure to comply.
62. Revocation of letters on proof of will or of revocation of will.
63. Revocation of letters on ground of disqualification.
64. Administration, &c., after a partial revocation.
65. Acts done before revocation are valid.
66. Supplementary letters may be issued after removal of disability.
67. Revocation on failure of appointment.
68. Form of letters: letters to be evidence of authority.
69. Meaning of term "executors," "administrators," &c.

Oath.

§ 56. Before letters testamentary, letters of administration with the will annexed, letters of administration, or letters of collection, are issued to any person, he must subscribe and take an oath or affirmation, before any officer authorized to administer oaths, that he will faithfully and honestly discharge the duties of his office, which oath must be filed.

2 R. S., 71, § 13; 72, § 41.

Bond.

§ 57. Every executor from whom a bond is required under sections 32, or 63, of this Code, and every administrator, and collector, before letters are issued, must execute a bond to the people of this state, with two or more sufficient sureties, to be approved by the surrogate, and to be jointly and severally bound. The

penalty in such bond must be not less than twice the value of the [real property not disposed of by the will, if any, and of] personal property; which value is to be ascertained by the surrogate, by the examination on oath of the applicant, and of any other person. In the case of an executor, an administrator with the will annexed, or a collector, the surrogate may also take into consideration the value of the real property or the rents in fixing the amount of the security. The bond muust be conditional that such executor, administrator, or collector, as the case may be, shall faithfully execute the trust reposed in him as such, and obey all lawful orders of the surrogate, touching the administration of the estate committed to him.

From 2 R. S., 77, §§ 42, 43. The words in brackets should be omitted if Appendix A is substituted for the text of the Civil Code.

**Deposit of securities.**

§ 58. If in any case, in which a bond or new sureties may be required, the value of the estate is so large that the surrogate deems it not practicable or reasonable to require security in the full amount, he may allow any securities belonging to the estate to be deposited in his office, or in some trust company duly authorized, and thereupon fix the amount of the bond, as for the value of the remainder of the estate not so deposited.

This provision is new.

**Requiring new bond or new sureties.**

§ 59. If complaint is made to the surrogate that any surety in any bond, provided for in this chapter, is insufficient, or is, or is about to become, a non-resident of this state, or that the bond is inadequate in amount, the surrogate must issue an order requiring the principal in the bond to show cause why he should not give a new bond or further sureties, as the case may be. On the return of the order, if the objections to the security are found valid, the surrogate may make an order requiring the party to give further sureties, or a new bond in a larger amount, within a reasonable time.

Laws of 1837, ch. 460, §§ 25–27, 35; same stat., 3 R. S., 5th ed., 163, 164, §§ 47–49, 57.

**Releasing sureties.**

§ 60. If any surety in any bond, provided for in this chapter, applies to the surrogate to be released from responsibility on account of any future breach of the bond, the surrogate must issue an order requiring the principal to show cause why he should not give new sureties. On the return of the order, if the principal gives new sureties, to the satisfaction of the surrogate, within such reasonable time as he may require, the surrogate may make an

order releasing the applicant from liability on the bond for any subsequent act, default, or misconduct of the principal.

Laws of 1837, ch. 460, §§ 29, 30; same stat., 3 R. S., 5th ed., 163, 164, §§ 51, 52.

Revocation of letters for failure to comply.

§ 61. If any person required to give new sureties or additional security, under the preceding two sections, fails to do so, within the time required, the surrogate must revoke the letters issued to such person, whose authority and rights, respecting the estate, shall thereupon cease. If any person to whom such order to show cause is issued fails to appear, in compliance therewith, the surrogate may, in his discretion, revoke the letters issued to such person, with the like effect.

Laws of 1837, ch. 460, §§ 28, 32; same stat., 3 R. S., 5th ed., 163, 164, §§ 50, 54; Laws of 1846, ch. 228; same stat., 3 R. S., 5th ed., 164, § 58; extended to embrace all cases as well as those of absent or non-resident executors and administrators.

Revocation of letters on proof of will or of revocation of will.

§ 62. If, after letters of administration are issued, a will is subsequently proved and letters are issued thereon; or if, after letters are issued, upon a will or revocation of the will, or a subsequent testamentary paper revoking the appointment of the executors, is proved, and letters testamentary, letters of administration with the will annexed, or letters of administration, are issued, the surrogate must thereupon revoke the letters first issued, by an order, in writing, to be served on the persons to whom such first letters were issued; and, until service thereof, the acts of such persons, done in good faith, are valid. The persons to whom such subsequent letters are issued are entitled to the possession of the property remaining unadministered, and may continue, in their own name, any actions brought by or against the persons to whom the first letters issued.

2 R. S., 78, § 46; extended to the case of a revocation of a will.

Revocation of letters on ground of disqualification.

§ 63. If, after any letters have been issued, it appears to the surrogate, or if complaint is made to him, that any person to whom they were issued is incompetent to have such letters, according to the provisions of this chapter, or that such person has been guilty of misconduct, disqualifying him, in the judgment of the surrogate, for the due execution of his office, or has refused to obey any lawful order of the surrogate, or that the issue of such letters was obtained by false representations, made by such person, the surrogate must issue an order requiring him to show

cause why the letters should not be revoked. On the return of such order, if the objections are found valid, the letters issued to such person must be revoked and superseded, and his authority shall thereupon cease; except that, in the case of an executor, if the only valid objections are that he is or is about to become a non-resident of this state, or that his circumstances would not, in the opinion of the surrogate, afford adequate security to the parties interested for the due administration of the estate, the surrogate may allow the letters to stand unrevoked, upon such executor giving, within a reasonable time, a bond, as provided in section 57. A testator has no power to dispense with the security which may be required by the surrogate under this section.

Modified from 2 R. S., 72, §§ 18–20; Laws of 1837, ch. 460, § 34; same stat., 3 R. S., 5th ed., 164, § 56.

**Administration, &c., after a partial revocation.**

§ 64. In case any one of several to whom letters are granted dies or becomes incapable of executing the trust reposed in him, or in case the letters are revoked or annulled, with respect to any one of several to whom they were issued, the remaining executors, administrators with the will annexed, administrators, or collectors, must proceed and complete the administration of the estate or the collection; and may continue any action brought by or against them all.

2 R. S., 78, § 44; Laws of 1837, ch. 460, § 33; same stat., 3 R. S., 5th ed., 164, § 55.

**Acts before revocation are valid.**

§ 65. All sales of property made in good faith, and all lawful acts done either by administrators before notice of a will or by executors or administrators with the will annexed, before notice of a subsequent will, or a revocation, or by executors, administrators with the will annexed, administrators, or collectors, before they become incapable or their letters are revoked, remain valid, and cannot be impeached on account of any will or revocation appearing, or by the revocation of the authority of such executors, administrators or collectors.

2 R. S., 79, § 47.

**Supplementary letters may be issued after removal of disability.**

§ 66. Where one is appointed executor, upon condition, and the appointment takes effect after letters testamentary, or of administration with the will annexed, have been issued; or where the disability of a person, under age or being an alien or a non-resident or a married woman, who would have been entitled, but for such disability, to letters testamentary, letters of administration with the will annexed, or letters of administration, is removed before the administration of the estate is completed, such person

shall be entitled, on application, to supplementary letters testamentary, or of administration, or of administration with the will annexed, as the case may be, to be issued in the same manner as original letters, and shall thereupon be authorized to act, in the administration of the estate, as if he had been named in the original letters, with the persons who have previously qualified.

2 R. S., 70, § 5; extended to cases of administrators, and administrators with the will annexed.

Revocation on failure of appointment.

§ 67. Where, by the terms of the will, a person appointed executor ceases to be such on condition, the surrogate may revoke the letters testamentary.

Form of letters.

§ 68. All letters must be issued in the name of the people of this state, and tested in the name of the surrogate or other officer issuing the same, and signed by him and sealed.

Letters to be evidence of authority

All such letters so issued by an officer having jurisdiction, and certified copies thereof, are conclusive evidence of the authority of the persons to whom they are granted, until reversed on appeal or revoked by the surrogate, or declared void by some competent tribunal.

2 R. S., 80, §§ 55, 56, 58.

Meaning of terms "executor," "administrator," &c.

§ 69. Except where the contrary appears, the term "administrator," wherever used in this Code, includes "administratrix," and "administrator with the will annexed," and "administratrix with the will annexed;" the term "executor" includes "executrix;" and the term "administrator with the will annexed" includes "administratrix with the will annexed."

## ARTICLE IX.

### ASSETS AND INVENTORIES.

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Appointment of appraisers.

§ 70. Upon the application of any executor, administrator or collector, the surrogate must, by writing, appoint two disinterested appraisers, as often as occasion may require, to estimate and appraise the property of the decedent; and they shall receive a reasonable compensation, to be allowed by the surrogate.

2 R. S., 82, § 1.

The appraisement.

§ 71. The executor, or collector, or administrator, must, within the time hereinafter specified, or sooner if required by the surrogate, make, with the aid of the appraisers, a true and perfect inventory of all the [real and] personal property of the decedent; and, when the same is in different and distant places, other appraisers may be appointed, if necessary.

2 R. S., 82, § 2. The words in brackets, which have been inserted, should be omitted if appendix A is substituted for chapter ——.

Notice of the appraisement.

§ 72. A notice of each such appraisement, specifying the time and place thereof, must be served, five days previous thereto, on the [devisees], legatees and successors, residing in the county of the surrogate; and it must also be posted in three of the most public places of the city or town where the decedent resided; or if he resided without the state, then where the property is situated.

NOTE.—2 R. S., 82, § 3. Modified by requiring the notice to be served on the parties within the surrogate's county, instead of on those in the county where the property is.

Appraiser's oath.

§ 73. Before acting, the appraisers must subscribe and take before any officer authorized to administer oaths, an oath or affirmation, which must be inserted in the inventory, that they will truly, honestly, and impartially appraise the property which shall be exhibited to them, according to the best of their knowledge and ability.

2 R. S., 82, § 4.

The inventory

§ 74. The appraisers must, in the presence of such parties interested in the estate as attend, set down in the inventory all the property of the decedent which is exhibited to them, naming each parcel and article separately; and estimate and appraise each, excepting those which by section of the CIVIL CODE are

to be set apart for the family, and set down the value thereof, distinctly in figures, opposite thereto.

2 Rev. Stat., 82, § 5. If appendix A is substituted for chapter of title , restoring the distinction between the realty and personalty, the following should be substituted for words, after the asterisk, in the foregoing:—All property mentioned in section and of the Civil Code which is exhibited to them, naming each article separately, and estimate and appraise each article mentioned in section of the CIVIL CODE, and set down the value thereof distinctly, in figures, opposite thereto.

Securities and moneys

§ 75. The inventory must contain a particular statement of all bonds, mortgages, notes and other securities, known to the executor, administrator or collector; specifying the name of the debtor, the date, the sum originally payable, the payments thereon, if any, with their dates; and the sum which, in the judgment of the appraisers, may be collectable on each; an account of all moneys belonging to the decedent, known to the executor, administrator or collector; and if none has come to his knowledge, the inventory must so state; a statement of any debt due by the executor, administrator or collector, to the decedent; and he is liable for the same, as for so much money in his hands, at the time such debt or demand becomes due.

Debts due from the executor or administrator.

2 R. S., 83, § 14.

Bequest of a debt is only a specific legacy.

§ 76. The discharge or bequest, in a will, of any debt or demand of the testator against any person is to be construed only as a specific bequest; and the amount of such debt must be included in the inventory; and so much thereof as may be necessary must be applied in the payment of the debts of the decedent.

2 R. S., 83, § 14.

Inventory to be returned.

§ 77. Upon the completion of the inventory, duplicates thereof must be made and signed by the appraisers; one of which must be retained by the executor, administrator or collector, and the other must be returned to the surrogate within three months from the date of the letters, or sooner if required by the surrogate.

2 R S., 83, § 15.

Oath to inventory.

§ 78. Upon returning such inventory, the executor, administrator or collector must subscribe and take, before any officer authorized to administer oaths, an oath or affirmation, to be annexed to the inventory, stating that such inventory is in all respects just and true; that it contains a true statement of all the [assets and per-

sonal] property of the decedent which has come to the knowledge of the deponent, and, particularly, of all money belonging to the decedent, and of all just claims of the decedent against such executor, administrator or collector, according to the best of his knowledge.

2 R. S., 84, § 16; Laws of 1837, ch. 460, § 59.

Compelling return.

§ 79. If the inventory is not made and returned to the surrogate within the three months, or sooner if required by the surrogate, the surrogate must issue an order requiring the executor, administrator or collector to show cause why he should not return an inventory, or why an attachment should not be issued against him. If, after due service of the order, the executor, administrator or collector does not, on the return-day of such order, file an inventory, or obtain further time to return the same, the surrogate must issue an attachment against him, and commit him to the common jail of the county, there to remain until he returns such inventory.

2 R. S., 85, §§ 17, 18.

Discharge from imprisonment

§ 80. Such executor, administrator or collector must be released from prison, by the surrogate, on his delivering, upon oath, all the property of the decedent, under his control, to the person having a legal authority to receive the same.

2 R. S., 85, § 22; modified so as to leave the power to discharge with the surrogate alone.

One of several executors, &c., may return inventory.

§ 81. Any one or more of the executors, administrators or collectors, on the neglect of the others, may return an inventory; and those so neglecting cannot thereafter interfere with the administration, nor have any power over the personal property of the decedent; but the party so returning an inventory has the whole administration, until the delinquent returns and verifies an inventory, according to law. An entry of the delinquency must be made on the margin of the record of the letters.

2 R. S., 86, § 23.

New assets.

§ 82. Whenever further property [assets] of any kind, not mentioned in any inventory, come to the knowledge of an executor, administrator or collector, he must cause the same to be appraised, and an inventory thereof to be returned, within two months after the discovery thereof, or sooner if required by the surrogate; and the making of such inventory and return may be enforced in the same manner as in the case of the first inventory.

2 R. S., 86, § 24.

## ARTICLE X.

### PAYMENT OF DEBTS AND LEGACIES, AND DISTRIBUTION OF SURPLUS.

SECTION 83. Sale of personal property.
84. Order of sale in case of an intestate.
85. Order of sale in case of a testator.

PAYMENT OF DEBTS.

86. Compromising debts.
87. Order of payment of debts.
88. Debts not due.
89. Debt due to the executor, &c.
90. Advertising for claims.
91. Vouchers and affidavit may be required.
92. Referring claim.
93. Limitation of action on disputed claim.
94. Effect of omission to present claim.
95. Costs in action on such claim.
96. Neglect to present does not preclude recovery from heirs, &c.
97. Surrogate may allow payment of debt after six months.

PAYMENT OF LEGACIES AND DISTRIBUTIVE SHARES.

98. Payment of legacy or distributive share due to a minor.
99. Surrogate to account therefor.
100. Unclaimed surplus to be paid into the treasury.
101. Surrogate may order payment of legacies and distributive shares before final accounting.
102. Security on paying legacy or share within the year.
103. Recalling legacies.

**Sale of personal property.**

§ 83. The executor or administrator has power, in his discretion, to sell [the real and personal property not specifically disposed of by the will.] If the debts and legacies cannot be paid and satisfied without such sale, the same, so far as may be necessary for such payment or satisfaction, must be sold. The sale may be public or private; and, except in the city of New York, may be on credit, not exceeding one year, with approved security. The executor or administrator is not responsible for any loss happening by such sale, when made in good faith, and with ordinary prudence. In making such sales, the executor or administrator must observe the order prescribed in sections 84 and 85, except that, where the decedent left a family, no household furniture or articles useful for the support and subsistence of the family, or articles of domestic use and ornament, shall be applied, unless

otherwise directed in the will, until all the other property has been exhausted.

Modified from 2 R. S., 87, §§ 25, 26. If Appendix A is substituted for chapter , the words personal property should be substituted for those in brackets in the first part of the section, and the following words may be added at the end of the section: Real property, necessary to be sold for the payment of debts and legacies may be sold by the order of the surrogate.

Order of sale in case of an intestate.

§ 84. When the decedent died intestate, the property is to be resorted to, in the following order, in payment of debts:

1. The personal assets mentioned in section of the CIVIL CODE, excepting such as are exempted by sections and of that Code;

2. Real property.

The reference is to the chapter on Succession.

Order of sale in case of a testator.

§ 85. In the case of a testator the property is to be resorted to, in the following order, for the payment of debts and legacies:

1. Personal assets, mentioned in section of the CIVIL CODE, excepting such as are exempted by sections and of that Code, and such as are expressly exempted in the will;

The reference is to the chapter on Succession.

2. Real property expressly devised to pay debts or legacies, where the personal property is exempted in the will, or where the personal property which is not exempted is insufficient;

3. Real property which is not effectually devised;

4. Property, real or personal, charged with debts or legacies, but though real property be charged with the payment of legacies, the personal property shall not be exonerated;

5. The following property, ratably: Real property, devised without being charged with debts or legacies, and specific and demonstrative legacies;

6. Personal property expressly exempted in the will.

This and the preceding section are new.

## PAYMENT OF DEBTS.

Compromising debts.

§ 86. The surrogate may, in his discretion, and on terms to be approved by him, authorize the collector, executor or administrator to compromise any debt or claim belonging to the estate or against the estate; but any party interested may, on the settlement of the

accounts, show that such debt or claim was fraudulently compromised.

Laws of 1847, ch. 80, § 1; extended to cases of claims against the estate, and to compromises by a collector.

Order of payment of debts.

§ 87. The debts and the expenses of administration must be paid in the following order:

1. Funeral expenses, and other charges necessarily incurred in the course of the administration;

2. Debts entitled to a preference, under the laws of the United States;

3. Charges for medical attendance during the last sickness;

4. Wages due to any laborer, artisan, operative or domestic servant, employed by the decedent;

5. Taxes and assessments upon the property of the decedent, due at the time of his death; but the payment of taxes and assessments on real property constitute a charge on such property;

6. Judgments docketed and decrees enrolled against the decedent, according to the priority thereof, respectively, provided the decedent left any real property on which such judgment or decree was, at the time of his death, a lien; and the payment thereof thereupon becomes a charge upon such real property;

7. All other demands.

The surrogate may, in his discretion, give to any debt a preference over any others, except those mentioned in subdivisions 1 and 2, whenever it appears, to his satisfaction, that the same will benefit the estate. No other preferences whatever can be given.

From 2 Rev. Stat., 87, §§ 27, 28, 30. Subdivisions 1, 3 and 4 are new. Assessments have been provided for in subdivision 5, and a provision added making payments a charge on the real property. Subdivision 3 of the statute, here numbered 6, is modified so as to give priority only to those judgments and decrees which bind the real property, and to make payment of those likewise a charge. The surrogate's power to allow preferences is also made general.

Debts not due.

§ 88. Debts not due may be paid, on a rebate of interest thereon for the time unexpired.

2 R. S., 87, § 29.

Debt due to the executor, &c.

§ 89. No property of the decedent can be retained by the executor, administrator or collector, in satisfaction of his own debt or claim, without the order of the surrogate, on the final accounting, or on previous application, upon an order to show cause, issued to

all the parties interested; and such debt must be established upon the same proof as required by law in case of other debts.

2 R. S., 88, § 33; Laws of 1857, ch. 460, § 37.

Advertising for claims.

§ 90. A collector, who is authorized by the surrogate to pay debts, and an executor or administrator, may, at any time after the granting of letters, insert a notice, once in each week for six months, in a newspaper printed in the county, and in so many other newspapers as the surrogate may deem most likely to give notice to the creditors of the decedent, requiring all persons having claims against the decedent to exhibit the same, with the vouchers thereof, to such collector, executor or administrator, at a place to be specified in such notice, at or before the day therein named, which must be at least six months from the day of the first publication of such notice.

2 R. S., 88, § 34.

Vouchers and affidavit may be required.

§ 91. Upon any claim being presented against the estate, the collector, executor or administrator may require satisfactory vouchers in support thereof; and also, the affidavit of the claimant, that such claim is justly due, that no payments have been made thereon, and that there are no offsets against the same, to the knowledge of such claimant.

2 R. S., 88, § 35.

Referring claim.

§ 92. If the collector, executor or administrator, doubt the justice of any claim so presented, he may enter into an agreement, in writing, with the claimant, to refer the matter in controversy, whether the same is of a legal or an equitable nature, to one or to three disinterested persons, to be approved by the surrogate; whereupon the surrogate may order such reference. The agreement and order must be filed in the office of the clerk of the county in which, by the provisions of the Code of Procedure, an action upon such claim ought to be tried; the parties must plead before the referee, and the proceedings are to be the same in all respects as if such reference had been ordered on an action commenced in the Supreme Court.

Modified from 2 R. S., 88, §§ 36, 37, so as to adapt it to all demands.

Limitation of action on disputed claim.

§ 93. If a claim is presented, under section 90, or at any time, is disputed or rejected by the collector, executor or administrator, and not referred, the claimant must, within six months after such dispute or rejection, or after some part of the debt becomes due, commence an action for the recovery thereof or be forever barred

from maintaining any action thereon; and, if such action is not commenced within that time, no action can ever be maintained thereon by any person.

2 R. S., 89, § 38.

Effect of omission to present claim.

§ 94. In an action brought on a claim which was not presented within six months from the first publication of the notice provided for by section 90, the collector, executor or administrator is not chargeable for any assets that he may have paid in satisfaction of any debts, legacies or distributive shares, before such action was commenced.

2 R. S., 89, § 39.

Costs in action on such claim.

§ 95. In such action no costs can be recovered against the collector, executor or administrator; nor can any costs be recovered in any action against a collector, executor or administrator, unless it appears that payment was unreasonably resisted or neglected, or that the defendant refused to refer it, pursuant to section 92; in which cases, the court may award such costs against the defendant personally, or against the estate, as may be just.

2 R. S., 90, § 41.

Neglect to present does not preclude recovery from heirs, &c.

§ 96. A creditor who neglects to present his claim, as prescribed by section 90, or who neglects to commence an action as prescribed by section 93, may, notwithstanding, recover the same from the husband, widow, next of kin and legatees of the decedent, in the cases and manner prescribed by law, provided action is brought within two years after the expiration of the advertisement.

Modified from 2 R. S., 90, § 42.

Surrogate may direct payment of debts after six months.

§ 97. At any time after six months from the issuing of letters, any creditor may apply to the surrogate for an order requiring the executor, administrator or collector to show cause why his demand, or a proportionate part thereof, should not be paid; and on the return of the order, the surrogate, after inquiring into the assets applicable thereto, may make such order as shall be just, unless the demand be disputed and no judgment has been recovered thereon.

From 2 R. S., 116, § 18.

Payment of legacy or distributive share due to a minor.

§ 98. In case a legatee or person entitled to a distributive share is a minor, the legacy or share, if it does not exceed one hundred dollars in value, may be paid to his father, for the use of the minor. If it exceeds that value, it may be paid to his general guardian; provided the guardian has given security, approved by the surrogate or by the court by which he was appointed, sufficient therefor;

but if there is no such guardian, it must be paid into the surrogate's court, and invested in permanent securities by the surrogate in the name and for the benefit of the minor, upon interest; and the surrogate must keep the securities in his office, and collect the interest, and the same may be applied, under his direction, to the support and education of the minor.

Modified from 2 R. S., 91, §§ 47, 48.

**Surrogate to account therefor.**

§ 99. On coming of age, the minor is entitled to receive the securities and the interest unapplied; and the surrogate and his sureties are liable to the beneficiary and his legal representatives for the faithful discharge of this trust.

2 R. S., 91, §§ 50, 51.

**Unclaimed surplus to be paid into the treasury in certain cases.**

§ 100. In case of intestacy, partial or total, as to personal property, if no one appears to claim the property, within two years after the letters were granted, the surplus must be paid into the treasury of the state, for the benefit of those who may thereafter appear to be entitled to the same.

2 R. S., 98, § 81.

**Surrogate may order payment of legacies and distributive shares before final accounting.**

§ 101. At any time after one year from the issuing of letters, the surrogate may, on the application of a party entitled to a legacy or distributive share, and on an order to show cause, examine into the assets properly applicable to the payment thereof, and, if there are sufficient, he may order the same, or a proportionate part thereof, to be paid. If, on a similar application, before the expiration of the year, and after six months from the issuing of letters, it appears that there is at least one-third more of assets in hand than are necessary to pay all known debts, legacies and claims against the estate, the surrogate may make a similar order for the payment of such portion of the legacy or share as may be necessary for the support of the applicant, upon satisfactory security being given, as required by the following section.

2 R. S., 98, §§ 82, 83; id., 116, § 18.

**Security on paying legacy or share within the year.**

§ 102. In case application is made for the payment of a legacy or distributive share, or any part thereof, within one year after the issue of letters, the executor or administrator may require a bond, in a proper penalty, with two sufficient sureties, conditioned to refund the whole or a part of such payment, with interest, to the executor or administrator entitled thereto, if such refunding is ordered by the surrogate.

From 2 R. S., 90, § 44.

Recalling legacies.

§ 103. The executor may recall any legacies, in whole or in part, as may be necessary, to pay debts chargeable thereon, of which he had not notice at the time of delivery or payment of the legacies.

## ARTICLE IX.

### ACCOUNTING.

SECTION 104. When accounting may be required.
105. Order, how enforced.
106. Examination and proof of payments.
107. Vouchers.
108. Settlement and distribution.
109. Profits and losses.
110. Interest.
111. Buying claims.
112, 113. Compensation.
114. Final account.
115. Citation.
116. Parties.
117. Reference.
118. Effect of final account.
119. Order for payment and distribution.
120. Delivery and assignment of assets.
121. Sums may be reserved.
122. Property exempt to be accounted for, if not set apart.
123. Accounting between several co-executors, &c.
124. Public administrator excepted.

When accounting may be required.

§ 104. The surrogate may, from time to time, in his discretion, require, by order, accountings in the following cases:

1. From a collector, at any time after the issuing of his letters;

2. From an executor or administrator, at any time after the expiration of one year from the issuing of his letters;

3. From an executor, administrator or collector, at any time after his letters have been revoked or his powers have ceased;

4. From an executor, administrator or other person appointed to sell, mortgage or lease real property of the decedent, under article XIII, at any time after such sale, mortgaging or leasing;

5. From an executor or administrator acting a power of sale of real property given in a will.

2 R. S., 109, § 57.

Such order may be made upon application of some person interested in the estate or succeeding to the administration thereof, including a child born after the making of a will, or of some

person on behalf of any minor having such interest, or of any surety upon the bond of such executor, administrator, collector or other person, or the legal representatives of such surety, or without such application.

From 2 R. S., 92, § 52; and Laws of 1857, ch. 460, § 36 (same stat., 2 R. S., 5th ed., 182, § 76); as amended, Laws of 1859, 569, ch. 261, § 1; modified by allowing the account after one year instead of eighteen months. Subdivision 4 is from 2 R. S., 106, § 34.

Order, how enforced.

§ 105. If the party so required to account, fail to appear, or disobeys the order, or evades service of the order, the surrogate may issue an attachment against him, with the like effect as provided by sections 79 and 80. He may also, by an order, revoke the letters and grant letters on the estate to the person entitled thereto, other than such executor or administrator, or to some other person as collector, as the case may be.

Laws of 1846, ch. 288; same stat., 2 R. S., 5th ed., 164, § 58.

Examination and proof of payments.

§ 106. On rendering the account, the accounting party may be examined on oath concerning his receipts, disbursements, and any other matter relating to the estate. He must produce vouchers which must be filed with the surrogate, for all payments; except that he may be allowed any item of expenditure, not exceeding twenty dollars, for which no voucher is produced, if such item be supported by his own uncontradicted oath, stating positively the fact of payment, and specifying when and to whom it was made; but such allowances cannot, in the whole, exceed five hundred dollars.

2 R. S., 92, § 55.

Vouchers.

§ 107. Vouchers are presumptive evidence of disbursements, without other proof, unless impeached. If lost, the accounting party must, if required, make oath to that fact, and state the contents and purport of the voucher.

This section is new.

Settlement and distribution.

§ 108. An account may be voluntarily filed by an executor, administrator or collector, at any time; and in all cases the settlement of the account and distribution of the estate may be ordered by the surrogate at such time as he deems proper, upon the consent of all the parties in interest, or, at any time after the expiration of one year from the issuing of letters testamentary or of administration, without such consent.

Profits and losses.

§ 109. No profits can be made by executors, administrators or collectors by the increase, nor are they liable for the decrease or loss, without their fault, of any part of the estate; but they must account for such increase, and be allowed for such decrease or loss.

2 R. S., 93, §§ 56, 57.

Interest.

§ 110. If they have negligently permitted funds to be idle, when the same should have been invested, they are chargeable with simple interest. If they have converted funds to their own use, or have employed them in any business, they are chargeable with compound interest, or with one-half the profits, whichever may be most to the advantage of the estate.

This section and the following are new.

Buying claims.

§ 111. An executor, administrator or collector cannot, directly or indirectly, buy, or be interested in buying, any demand or right in action against the estate, for his own benefit; nor in any way deal or traffic with the estate for his own benefit.

Van Horne v. Fonda, 5 *Johns. Ch.*, 388.

Compensation.

§ 112. The surrogate must allow to the executor, administrator or collector, for his services, and if there are more than one, apportion among them according to the services rendered by them respectively, over and above his or their expenses:

1. For receiving and paying all sums, not exceeding one thousand dollars, at the rate of five per cent;

2. For receiving and paying all sums, exceeding one thousand dollars, and not amounting to five thousand dollars, at the rate of two and a half per cent;

3. For receiving and paying all sums above five thousand dollars, at the rate of one per cent;

4. Just and reasonable allowance for the care and management of real property;

5. Just and reasonable allowance for actual and necessary expenses.

The same rates of commissions are to be allowed annually, in all cases of executory trusts, upon annuities and the income of legacies.

From 2 R. S., 93, § 58, as amended by Laws of 1849, ch. 160. Subdivision 4 and the last sentence of the section are new.

§ 113. Where the will provides specific compensation for an executor, he is entitled to no commissions, unless, by a writing, filed with the surrogate, he renounces such compensation. Compensation.

2 R. S., 93, § 59.

§ 114. Final accounting may be had, from time to time: Final account.

1. By an executor or administrator, or by a testamentary trustee, created by a will or appointed by competent authority, or any executor or administrator, with the will annexed, authorized to execute such trust, after the expiration of one year from the issuing of his letters or from the time of his appointment, and upon an order made under section 104;

2. By an executor, administrator or collector, whose letters have been revoked or whose powers have ceased, or by an executor, administrator or other person appointed to sell, mortgage or lease real property of the decedent, under article XIII, or authorized to do so by a power in the will, at any time.

§ 115. On a final accounting, the accounting party may obtain a citation to all parties interested to attend; and, on such accounting, the same rules apply as in the case of a compulsory accounting. Citation.

2 R. S., 95, § 70.

§ 116. Creditors, legatees, next of kin, or other persons interested in or succeeding to the administration of the estate, or interested in such accounting, or any person on behalf of a minor so interested, are entitled to service of the citation, and may contest the account or any matter relating to the settlement and distribution of the estate. Parties.

2 R. S., 94, § 63.

§ 117. The surrogate may appoint one or three referees to examine the accounts, to hear and determine all matters relating thereto, and to make report thereon, subject to his confirmation. Such referees have the same powers and compensation as referees in civil actions. Reference.

From 2 R. S., 94, § 64. Partially new.

§ 118. The final settlement of an account and the allowance thereof, by the surrogate, or on appeal, has, as against all creditors, legatees, next of kin, and other persons in any way interested in, or succeeding to the administration of the estate, or interested in such accounting, upon whom the citation was duly served, including minors, and including the sureties upon the official bond, the same force and effect as the judgment of the supreme court, on Effect of final account.

the final settlement of such accounts, and of the matters relating to such estate, which have been embraced in such accounts or litigated or determined on the settlement.

2 R. S., 94, § 66, as amended by Laws of 1850, ch. 272.

Order for payment and distribution.

§ 119. When any account is rendered and settled, if it appears to the surrogate that the estate should be distributed, he must decree payment and distribution to and among the parties interested, according to their respective rights; and, in such decree, must determine all questions concerning any debt, claim, legacy, bequest or distributive share, to whom the same is payable, and the sum to be paid to each person. In case of a collector or superseded executor or administrator, payment, when ordered, is to be decreed to the party succeeding to the administration of the estate.

2 R. S., 95, § 71.

Delivery and assignment of assets.

§ 120. In such decree, the surrogate may, upon written consent of the parties who have appeared, direct the delivery and assignment of any assets to and among those entitled to payment or distribution, in lieu of so much money as such assets may be worth, to be ascertained by the appraisement on oath of persons appointed by the surrogate for that purpose.

2 R. S., 95, § 72.

Sums may be reserved.

§ 121. If, on an accounting, it appears to the surrogate that any claim exists against the estate which is not due, or on which a suit is pending, he must allow a sum sufficient to satisfy such claim, or the proportion to which it may be entitled, to be retained, for the purpose of being applied to its payment when due, or recovered, with the expense of contesting the same, or to be distributed according to law. The sum so retained may be left in the hands of the executor or administrator, or may be directed by the surrogate to be deposited in some safe bank, subject to the order of the surrogate.

2 R. S., 96, § 74.

Property exempt to be accounted for, if not set apart.

§ 122. If the executor, administrator or collector fails to set apart the property, for the surviving husband, widow or child, directed by § of the CIVIL CODE, the surrogate may, on an order to show cause, require him to do so, or if such property has been sold, as a part of the assets, to pay the value thereof in money.

New. See Shelden *v.* Bliss, 8 *N. Y.*, 31.

Accounting between several

§ 124. The surrogate may, on application of either of several co-executors, co-administrators or co-collectors, and on an order to

show cause, issued to the others, inquire into and settle the amount due from any or all of them to the estate, and make such order respecting the payment or security thereof as may be just. co-executors, &c.

§ 124. The provisions of this and the two preceding articles do not apply to the public administrator of the city of New York, or to any letters granted to him, except in cases specially provided. Public administrator excepted.

## ARTICLE XII.

### POWERS AND DUTIES OF EXECUTORS, ADMINISTRATORS AND COLLECTORS, AND ACTIONS BY AND AGAINST THEM.

SECTION 125. Rights in action survive to the personal representative.
126. Exceptions; rights which do not survive.
127. Rights which survive to or against the successor.
128. Rights which survive to or against the heir or devisee.
129. Action for act or neglect causing death.
130. Measure of damages.
131. Recovery of assets and possession of real property.
132. Executor, &c., may recover back certain payments.
133. May disaffirm fraudulent and wrongful acts.
134. Executors, &c., to hold in joint tenancy.
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136. Sales by part of the executors.
137. Funds to be separately deposited.
138. Power of surrogate in case of disagreement.
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Rights in action survive to the personal representative.

§ 125. Upon the death of any person, all demands whatsoever, and all rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as hereinafter provided, survive to and against the executor, administrator and collector of his estate.

Exceptions; rights which die with the person.

§ 126. The following rights in action do not survive:

1. Causes of action for libel and for slander, except slander of title;

2. Causes of action for false imprisonment, assault and battery, or other injuries to the person, where such injury does not cause the death of the injured party;

3. Causes of action accruing against a husband, by reason of his marriage, for the debts of the wife contracted by her before marriage;

4. Cases where the relief sought could not be enjoyed, or granting it would be entirely nugatory, after the death.

The last subdivision is intended to cover such cases as divorce, specific enforcement of contracts for personal skilled services, &c.

Exceptions; rights which survive to or against the successor.

§ 127. Rights in action existing in favor of or against a person in an official or representative capacity survive to and against his successors. Such rights of action survive against the executor, administrator or collector of such person so far only as he was personally liable thereon, or so far as his executor, administrator or collector has become possessed of the money or property for recovery of which the action or proceeding is had, or so far as they are necessary parties to a complete determination of the controversy.

Exceptions; rights which survive to or against the heir or devisee.

§ 128. The following causes of action, and rights arising out of real property, [effectually devised,] and any proceedings relating thereto, do not survive to and against the executor, administrator or collector; but survive to and against the devisee of such real property:[1]

1. Causes of action in favor of the decedent, for waste of real property;[2]

2. Causes of action against the decedent, for specific performance of a contract to convey real property;[3]

3. Causes of action on any contract of insurance on real property;[4]

4. Rights existing in favor of the decedent, to redeem real property from any judicial sale or from any lien or incumbrance thereon;[5]

5. Causes of action in favor of or against the decedent, to recover the possession of real property wrongfully withheld by him or to determine conflicting claims to real property;[6]

[1] If appendix A is adopted, the words in brackets should be omitted, "heir or" and inserted before "devisee."
[2] 2 R. S., 334, § 4.
[3] 2 R. S., 194, § 169.
[4] This provision is new.
[5] 2 R. S., 370, § 46, subdivision 2.
[6] This provision is new.

**Action for act or neglect causing death.**

§ 129. Whenever the death of a person is caused by a wrongful act, neglect or default, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors, are liable to an action for damages, to be brought, within two years after such death, by the executor, administrator or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amount in law to a felony.

Laws of 1847, 575, ch. 450; 1849, 388, 256, § 1.

**Measure of damages.**

§ 130. The plaintiff, in such action, may recover such damages, not exceeding five thousand dollars, as are a fair and just compensation for the injury, including loss of society and comfort, resulting from such death, to the husband or widow, and next of kin. The amount recovered is not liable to be applied, as assets, in the payment of debts or legacies; but is to be distributed as provided in the article of the Civil Code on Succession.

Id., § 2; modified by making the recovery inure to the benefit of a husband as well as a widow, and by allowing loss of society and comfort to be considered in fixing the damages.

**Recovery of assets and of possession.**

§ 131. Executors, administrators and collectors may maintain any appropriate action or proceeding to recover assets, and to

sion of real property.

recover real property of which executors are authorized to take possession by the will, [or which is not effectually devised;] and to recover for any injury done to such assets or real property at any time subsequent to the death of the decedent.

Executor, &c., may recover back certain payments.

§ 132. Executors, administrators or collectors may recover from the parties entitled to succeed to the property of the decedent, and the devisees and legatees under his will, all necessary and reasonable costs and expenses incurred by them in good faith in the discharge of their duties, in respect to property which such person may take by succession or will.

If they pay, from the personal property, debts or legacies which should be paid out of the real property, the payment becomes a charge in their favor against the real property.

Laws of 1858, 506, ch. 314, § 3. The latter provision is new.

May disaffirm fraudulent and wrongful acts.

§ 133. An executor, administrator or collector may disaffirm and treat as void all transactions in fraud of the rights of any creditor of the decedent or of the estate and other parties interested therein, including his own rights, and may recover any property wrongfully received or taken in fraud of such rights, or the value of such property, or damages caused by such acts, or by any unlawful interference with the estate.

Laws of 1858, 506, ch. 314, §§ 1, 2.

Executors, &c., to hold in joint tenancy.

§ 134. Every estate vested in executors or administrators or collectors as such is held by them in joint tenancy.

1 R. S., 727, § 44.

Sales of real property, how made.

§ 135. Sales of real property made pursuant to authority given by will, unless the will otherwise direct, may be public or private, and on such terms as, in the opinion of the executor, are most advantageous to those interested therein.

Laws of 1837, ch. 460, § 43.

Sales by part of the executors, &c.

§ 136. Where a will devises any real property to executors to be sold, or confers on them a power of sale, if one or more of the executors, or administrators with the will annexed, fail to take upon him the execution of such will, then any sale made by those who take upon them the execution thereof is valid, as if the others had joined.

2 R. S., 109, § 55.

Funds to be separately deposited.

§ 137. It is the duty of an executor, administrator or collector to deposit the funds of the estate to a separate account in his trust

capacity, with some safe bank or trust company, and on failure so to do, he is chargeable with interest on all funds remaining on hand.

This and the four following sections are new.

**Power of surrogate in case of disagreement.**

§ 138. Where executors or administrators or collectors disagree as to the management of the estate or the custody thereof, either of them or any party in interest may apply to the surrogate for an order requiring them to show cause why the surrogate should not give directions in the premises. On due service of such order the surrogate must give proper directions for the joint management of the estate, and he may direct the assets to be deposited in some safe place in the joint custody of the executors, administrators or collectors, and the funds to be deposited in some safe bank or trust company, to their joint order. Disobedience of such direction may be punished by attachment and commitment.

**Compounding for outstanding estates.**

§ 139. Where executors are directed or empowered to sell real property, they may compound with any person having an interest in such real property. The value of an interest for life is to be ascertained in the mode prescribed by the rules of court in respect to dower and partition.

**Bidding in property.**

§ 140. At any auction sale of real property belonging to the estate, the executors, administrators or collectors may bid in the property and take a conveyance to themselves as executors, administrators or collectors for the benefit of the estate, when, in their discretion, this is necessary to prevent a loss to the estate.

**Acknowledgment does not affect heirs, &c.**

§ 141. No acknowledgment by an executor, administrator or collector binds real property [which is effectually devised] or affects the right of any [heir or] devisee, unless authority for that purpose is conferred by the will.

**Promises, to charge the executor, &c., personally, must be in writing, &c.**

§ 142. No executor, administrator or collector is chargeable upon any promise to answer damages or pay the decedent's debts out of his own estate, unless an agreement, or some memorandum or note thereof, stating in express terms that the obligation is personal, is in writing, and subscribed by such executor, administrator or collector, or by some person by him thereunto specially authorized.

Modified from 2 R. S., 113, by requiring the promise to state an intention to charge the promiser personally, in express terms; and by requiring subscription instead of signing in conformity with the provisions of the statute of frauds. 2 R. S., 134–136.

Liability on leases.

§ 143. The executor or administrator is not personally liable for rent accrued, or to accrue, upon a lease to the decedent beyond the amount of rents received by him from the demised property. Leases renewed by an executor or administrator inure to the benefit of the estate; and the executor or administrator is personally liable thereon only to the extent prescribed in this section, unless the renewal expressly provide otherwise in writing.

This section and the four following are new.

Losses.

§ 144. An executor, administrator or collector is not liable for property stolen, wasted or destroyed without his negligence or default.

Compromises of debts.

§ 145. If an executor, administrator or collector compromise any debt or claim belonging to the estate without authority from the surrogate, pursuant to section 86, he is liable for so much of the amount released as he fails to show could not have been with due diligence collected, and no more.

Default of co-executors, &c.

§ 146. One of several executors, administrators or collectors is not chargeable for property which comes only to the hands of his co-executor, co-administrator or co-collector, without his assent or neglect.

See Douglas *v.* Satterlee, 11 *Johns.;* Monell *v.* Monell, 5 *Johns. Ch.*, 283.

Foreign executor.

§ 147. Foreign executors and administrators have no authority whatever in this state, unless upon letters granted here, nor are voluntary payments to them valid; and they must account for assets received here, and the surrogate may decree distribution or, in his discretion, direct the assets to be remitted to the place of principal administration.

No one liable as executor of his own wrong.

§ 148. No person is liable to an action as executor of his own wrong, for having received, taken or interfered with, the property of a decedent.

2 R. S., 449, § 17.

All actions to be brought in representative capacity.

§ 149. All actions and proceedings brought by or against executors, administrators or collectors, upon any cause of action or right in which the estate is the real party in interest, must be brought by or against them in their representative capacity.

At present, in a large class of cases, the executor, &c., may sue in his individual capacity. This section is intended to prescribe one rule for all cases where the right accrues or is held in a representative capacity.

§ 150. In actions by and against executors it is not necessary to join, as parties, those to whom letters have not been issued.

Laws of 1838, ch. 149.

Executors who have not received letters need not be joined.

§ 151. An action may be brought against an executor, administrator or collector, on a demand against the estate, at any time after it is due, or by a legatee or person entitled to a distributive share, after the lapse of a year from the granting of letters; but no execution can issue against the executor, administrator or collector on a judgment therein against him without leave of the surrogate, as hereinafter provided; and such a judgment is a lien on the property of the executor, administrator or collector, only from the time such leave is granted.

Actions against executors, &c., and lien of judgment.

§ 152. Any creditor, legatee or person entitled to a distributive share, who holds a judgment against an executor or administrator, or collector, may, from time to time, apply to the surrogate for an order requiring him to account, and show cause why execution should not be issued. On due service of the order, the executor or administrator, or collector, must appear and account; and if it appears to the surrogate that there are assets properly applicable to payment of the judgment, he may make an order allowing execution to issue for such amount as is properly so applicable.

From 2 R. S., 116, § 20.

Leave to issue execution.

§ 153. An executor, administrator or collector is not liable to arrest or to the issue of an attachment by reason of any act or default of the decedent.

Substituted for 2 R. S., 448, §§ 3, 4.

Liability to arrest, &c.

§ 154. In actions against several executors, administrators or collectors, they are all to be considered as one person, representing the decedent; and if the summons is served on one or more, but not on all, the plaintiff may proceed against those served, and if he recovers judgment it may be entered against all.

2 R. S., 448, § 5.

Appearance by one of several executors, &c.

§ 155. A claim in favor of or against the estate cannot be set-off against a claim against or in favor of the executor, administrator or collector, in his own right, whether before or after judgment or decree.

This section is intended to modify the rule declared in Dubois *v.* Dubois, 6 *Cow.*, 494, where it was held that after decree there might be a set-off.

Set-off and counter-claim.

Limitation of actions by and against executors, &c.

§ 156. The time which elapses between the death of any person and the granting of letters testamentary, or of administration or collection, on his estate, and the period of six months after the granting of such letters, is not to be deemed any part of the time limited by any law for the commencement of actions by his executor, administrator or collector

The rule of 2 R. S., 448, sec. 9, extended to claims against as well as in favor of the estate. (2 R. S., 448, § 9.)

By collectors.

§ 157. The provisions of law in relation to the time prescribed for the commencement of actions by executors and administrators apply to the case of collectors.

Judgment against decedent, how enforced.

§ 158. The cases in which a judgment against the decedent may be enforced by summons against his personal representatives are prescribed by section 376 of the CODE OF PROCEDURE.

Certain judgments are a bar.

§ 159. A judgment against one who receives the property of a decedent by will or succession is a bar to a subsequent action against the executor, administrator or collector of the decedent for the same cause of action, unless execution on such judgment has been returned unsatisfied.

2 R. S., 114, § 7.

Id.

§ 160. A judgment against such a one for a debt or legacy, expressly charged on the property which he took by succession or devise, is a bar to a subsequent action against the executor or administrator for the same debt or legacy, unless there are assets to pay the same, as prescribed in section 185.

2 R. S., 114, § 8.

Real property of decedent.

§ 161. The real property which belonged to any decedent is not bound or in any way affected by any judgment against his executors, administrators or collectors, nor liable to be sold by virtue of any execution issued upon such judgment.

2 R. S., 449, § 12.

Rights of a succeeding executor, &c., to issue execution.

§ 162. Any executor, administrator or collector may issue execution on any judgment recovered by any person who preceded him in the administration of the estate or by the decedent, in the same cases and the same manner as the original plaintiff might have done.

2 R. S., 449, § 13.

Other remedies.

§ 163. When administration of the effects of a decedent, which are left unadministered by any previous executor or administrator

of the same estate, is granted to any person, such person may have any remedy or proceeding to enforce, to review, or to resist, any judgment obtained by or against such previous executor or administrator of the same estate or by or against the decedent, and to prosecute or defend any action or proceeding by or against them or him, in the same manner as they or he might have done.

2 R. S., 450, § 18.

Actions, how continued in case of death or revocation of letters.

§ 164. In case the letters of an executor, administrator, or collector, are revoked, pending an action to which he is a party, the adverse party may, notwithstanding, continue the action against him, in order to charge him personally. If such party does not elect so to do, within six months after notice of such revocation, the action may be continued against the successor of the executor, administrator or collector, in the administration of the estate, in the same manner, as in case of death, as provided in section 121 of the CODE OF CIVIL PROCEDURE.

From 2 R. S., 115, §§ 14–17, fixing the time at six months.

Bond to be prosecuted on revocation of letters.

§ 165. Whenever the letters of an executor, administrator or collector, are revoked, his bond may be prosecuted by the person or persons succeeding to the administration of the estate; and a recovery is to be had thereon to the full extent of any injury sustained by the estate of the decedent by the acts or omissions of such executor or administrator, and to the full value of any property of the decedent received and not duly administered by such executor or administrator. Moneys so recovered are assets in the hands of the person recovering them; except that a recovery for an act, omission or other default, respecting property or rights of action, mentioned in section of the CIVIL CODE is for the benefit of the parties thereby entitled thereto.

This section and the following are new, and substituted for Laws of 1830, ch. 320, § 23.

Actions on the bond in other cases.

§ 166. If, in such case, no successor is appointed, and in all other cases of the breach of the condition of any bond required under the provisions of this Code from an executor, administrator or collector, any party aggrieved may, on obtaining leave of the surrogate, maintain an action upon the bond, on behalf of himself and all others interested, and recover thereon to the full extent of any injury sustained by the estate of the decedent by such breach. The amount collected, except as above provided, must be paid by the sheriff or other officer enforcing the judgment, into the surrogate's court, and the surrogate shall distribute

SECTION 210. Disposal of proceeds.
211. Conveyance on sale of the decedent's interest in part of lands contracted for.
212. Contract of sale, how enforced.

Applications to sell, mortgage or lease real property, &c.

§ 167. Any executor, administrator or collector, whether sole or conjoined with another, or any person interested in the estate as creditor, legatee, next of kin or otherwise, may, at any time within three years after the grant of letters testamentary or of administration, apply to the surrogate, by petition, for authority to mortgage, lease or sell, the real property of the decedent for the payment of the debts of such decedent, whether legal or equitable. The term real property, as used in the provisions of this article, extends to every interest in lands, including contracts for purchase, except such interests as are declared to be [personal assets by section , and such as are] exempt by section of the CIVIL CODE; and except real property expressly devised to pay debts.

2 R. S., 100, § 1, as amended by Laws of 1830, ch. 320, § 22; and Laws of 1837, ch. 460, §§ 40, 72; 2 R. S., 103, § 20; modified by limiting the time to three years. 2 R. S., 111, § 66.

Contents of the petition.

§ 168. The petition must be verified by the oath, and set forth, as far as the same can be ascertained:

1. The debts outstanding against the estate;

2. A description of all the real property of the decedent, and interests under contracts for the purchase of lands, with the value of the respective portions or lots; and whether improved or not; and whether occupied or not; and, if occupied, the names of the occupants;

3. The names and ages of the devisees and successors of the decedent, and any other party in interest;

4. If presented by an executor, administrator or collector, the amount of personal property which has come to his hands [and real property not effectually devised], and the application thereof; and that the debts on which the application is founded are not expressly charged, nor secured by judgment or mortgage, upon the real property of the decedent, or if so secured, by mortgage or charge, then, that the remedies of the creditor, on such mortgage or charge, have been exhausted.

2 R. S., 100, § 2.

Statement, when required.

§ 169. If such petition is presented by any other person than an executor, administrator or collector, the surrogate must direct the latter to file, on the return of the order to show cause herein-

after mentioned, a statement, under oath, of all the matters specified in the preceding section, so far as the same can be ascertained.

Guardians for minors.

§ 170. If it appears to the surrogate, by the petition or other competent evidence, that any of the persons named in subdivision 3 of section 168, are minors, having no general guardian within this state, the surrogate, before proceeding further, must appoint, by order, a special guardian, for the sole purpose of acting in the proceeding, whose written consent to serve must be filed with the surrogate. Notice of the intention to apply for such appointment must be served on the minor at the same length of time previous to the application for appointment, and in the same mode, as is hereinafter prescribed for service of citations.

From 2 R. S., 100, §§ 3, 4.

Order to show cause.

§ 171. If, upon such petition, it appears to the surrogate that all the personal property applicable to payment of debts has been so applied, or that the executor, administrator or collector has proceeded with reasonable diligence in converting the decedent's property into money and applying it to the payment of debts; and that it is insufficient for the payment of the debts on which the application is made, or that the debts cannot be paid without resort to the real property [devised], he may grant an order requiring all persons interested to appear at a specified time and place, not less than forty days, and not more than seventy days from the time of making the order, and show cause why the real property [devised by] the decedent should not be mortgaged, leased or sold. If it appear to the surrogate that there are any parties claiming an interest in the property, under the heirs or devisees, the order must be addressed also to them.

2 R. S., 101, § 5. The last clause is new. See Richardson *v.* Judah, 2 *Bradf.*, 157.

Publication and service of order.

§ 172. Such order must be published, in a newspaper printed in the county, once in each week, for four successive weeks, the publication to commence at least twenty-eight days before the time specified; and a copy thereof must be served on the parties named in subdivision 3 of section 168, except that in case of minors the service must be upon their general or special guardian.

2 R. S., 101, § 9.

The hearing

§ 173. Upon proof of the due publication and service of the order, the surrogate acquires full jurisdiction of the subject matter and of the parties so served; and he must thereupon proceed to

hear the proofs and allegations of the parties. The executors, administrators or collectors, and other witnesses may be examined.

2 R. S., 101, § 8; Laws of 1850, ch. 82; Bloom *v.* Burdick, 1 *Hill*, 130; Schneider *v.* McFarland, 2 *N. Y.* (2 *Comst.*), 459.

Contesting the demands.

§ 174. Any party in interest may show that all the [personal] property applicable to payment of debts has not been duly applied; may contest the validity of any demands represented as existing against the estate; and may set up the statute of limitations in bar to such demands; and no act or admission by an executor, administrator or collector, of any demand so barred can so revive the same as to authorize proceedings, under this article, for payment of the same.

2 R. S., 110, § 10.

Debt for which judgment has been recovered.

§ 175. Where a judgment or decree has been recovered against an executor, administrator or collector, for any debt due from the decedent, such debt is, notwithstanding, to be deemed a debt of the decedent, within the provisions of this article, to the same extent, and to be established in the same manner, as if judgment or decree had not been recovered; but a judgment or decree upon a trial on the merits is presumptive evidence of such debt before the surrogate.

Laws of 1837, ch. 460, § 72; as amended, Laws of 1843, ch. 172; 1847, ch. 298; same stat., 2 R. S., 5th ed., 196, § 59; Ferguson *v.* Broome, 1 *Bradf.*, 10.

Order for trial.

§ 176. If, on the hearing, a question of fact arises, which, in the opinion of the surrogate, requires a trial by jury, he may make an order, stating, distinctly and plainly, the questions of fact to be tried, and directing a trial at the next circuit court in the county, and such cases shall have preference on the calendar.

New trials of such questions may be granted by the court, in such cases, as in civil actions; and the final determination of the question is conclusive thereon in the proceedings before the surrogate.

2 R. S., 102, § 11; CODE OF PROCEDURE, § 72.

Record of demands which are established.

§ 177. The surrogate must enter in his records a list of the demands which are established against the estate, and the vouchers supporting the same must be filed in his office.

2 R. S., 102, § 13.

Cases in which application may be granted.

§ 178. The surrogate cannot grant the application until, upon examination, he is satisfied,

1. That the proceedings on such application are regular;

2. That the debts on which the application is founded were debts of the decedent, and are justly due and owing, and that they are not expressly charged, nor secured by judgment or mortgage, upon the real property of the decedent; or, if so secured, then that the remedies of the creditor, by virtue of such mortgage or charge, have been exhausted;

3. That all the [personal] property of the decedent which could have been applied to payment of the debts has been duly applied, or that the executor, administrator or collector has proceeded, with reasonable diligence, in converting the [personal] property into money, and applying it to the payment of debts; and that the same is insufficient for the payment of the debts on which the application is made; or that the debts cannot be paid without resort to the real property [devised].

2 R. S., 102, § 14; as modified by Laws of 1837, ch. 460, § 41. The last clause is new.

**Mortgage or lease to be made in preference to a sale.**

§ 179. The surrogate, when so satisfied, must ascertain whether sufficient money can be raised, advantageously to the estate, by a mortgage or lease of the property or a part thereof, and if so, he shall direct such mortgage or lease to be made, by the executor, administrator or collector.

2 R. S., 103, § 15.

**Limit of lease.**

§ 180. No such lease can be for a longer time than until the youngest person interested in the property leased becomes of age.

2 R. S., 103, § 16.

**Effect of lease or mortgage.**

§ 181. A deed, lease or mortgage, executed under the authority of the surrogate under this article, is as valid and effectual as if executed by the decedent immediately previous to his death.

2 R. S., 103, § 17.

**Sale.**

§ 182. If it appears to the surrogate that the moneys required cannot advantageously be raised by mortgage or lease, he must order a sale, by the executor, administrator or collector, of the real property or of a part thereof, or from time to time, successive sales of parts of it, as may be best for the estate, and the parties in interest. No more is to be sold than is sufficient to pay the debts of the decedent; except that if a part thereof cannot be sold without manifest prejudice to the parties in interest, then the whole or any part may be sold. The sale may be in such order as the surrogate may direct. In the case of a testator, the property must be sold in the order mentioned in section 85, except

that property expressly devised or charged to pay debts cannot be sold under the provisions of this article.

Modified from 2 R. S., 103, §§ 18–20.

Bond on order for sale, lease or mortgage

§ 183. Before granting an order to sell, mortgage or lease, the surrogate must require a bond to the people of this state, with two or more sureties, to be approved by him, and to be jointly and severally bound, in a penalty double the value of the property ordered to be sold or the amount to be raised by such mortgage or lease, conditioned for the payment of all such moneys, after deducting expenses, and for the delivery of all securities taken by them on any sale, to the surrogate, within twenty days after the same are received; and for the accounting for such moneys whenever required by the surrogate or a court of competent authority.

2 R. S., 104, § 21.

Appointment of person to make sale.

§ 184. If the executors, administrators or collectors fail to execute, within a reasonable time, the bond required by the preceding section, the surrogate must appoint a disinterested freeholder to execute such mortgage or lease or to make such sales, who must execute a similar bond, and has the same powers, and is liable to pay over, deliver and account, in respect thereto, in the same manner, as an executor, administrator or collector. In making such appointment he must give preference to any person nominated by the creditors of the decedent.

2 R. S., 104, §§ 23, 24.

New appointment.

§ 185. In case of the death, removal or disqualification of the executor, administrator or collector, or of the freeholder appointed, the proceeding does not abate; and the surrogate may authorize his successor, or another freeholder in place of such first appointee, to complete the proceedings; and he must give the security above required.

Laws of 1850, ch. 152.

Terms of sale.

§ 186. To secure an advantageous sale, the surrogate may allow the same to be made upon terms of a credit, not exceeding three years, for not more than three-fourths of the purchase money, to be secured by the purchaser's bond and mortgage upon the premises.

2 R. S., 105, § 28.

Mode.

§ 187. Where the property consists of several known lots, tracts or parcels, it is the duty of the person appointed to make

the sale, to cause each to be separately exposed for sale, unless the order otherwise direct.

This section is new. See Delaplaine *v.* Lawrence, 3 *N. Y.* (3 *Comst.*), 301; and see 2 R. S., 369, § 58.

Time and place of sale.

§ 188. Every sale of any parcel of real property, under an order made under this article, must be in the county where such parcel or the greater portion thereof is situated, at public vendue, between the hour of nine in the morning, and the setting of the sun of the same day.

2 R. S., 104, § 26.

Notice of sale.

§ 189. Notice of every such sale, describing, with common certainty, each parcel to be sold, and specifying the improvements thereon, if any, and stating the time and place of sale, must be posted, for six weeks, at three of the most public places in the town or ward where the sale is to be had, and shall be published in a newspaper, if there is one printed in the same county, and if none, then in the state paper, once in each week for six successive weeks, the publication to commence and the notice to be posted at least forty-two days before the day of sale.

2 R. S., 104, § 25.

Who not to purchase.

§ 190. The person appointed to make the sale, and the guardians of any minor interested, cannot, directly or indirectly, purchase, or be interested in the purchase, except for the benefit of the ward, or for the benefit of the estate, in the cases authorized by section 139. All sales made contrary to the provisions of this section are void, except as against a purchaser in good faith without notice.

Vacating or confirming sale.

§ 191. The person making the sale must immediately make a return of the proceedings upon such order of sale to the surrogate, who must examine the proceedings, and may also examine him and any other person on oath touching the same; and if he finds that the proceedings were unfair, or if he finds that the sum bid is disproportionate to the value, and that a sum exceeding such bid, at least ten per cent, exclusive of the expenses of a new sale, may be obtained, he must vacate the sale, and direct another, which shall be notified and conducted according to the preceding sections. Otherwise he must make an order confirming the sale and directing the proper conveyances to be executed.

2 R. S., 105, §§ 29, 30.

§ 192. Such conveyances must refer to the order of sale and the order of confirmation, and convey the estate free from the dower of the widow of the decedent. Conveyances.

2 R. S., 105, § 31. Modified so as to make a reference to the orders sufficient, in place of reciting them at large.

§ 193. Irregularities and defects in the petition, subsequent proceedings, or in the recitals in the deed, do not affect the title of a purchaser in good faith, unless they are such as would affect such a title under a purchase on a sale by order of a court of general jurisdiction. This section applies to all proceedings and sales heretofore made or had under the direction of any surrogate. Title not affected by irregularities.

Laws of 1850, ch. 82; 2 R. S., 110, § 59.

§ 194. The successors and devisees and all the remaining real property of the decedent are exonerated from all claim or charge by reason of debts established under sections 177 and 196, in so far as the moneys arising from the sale, lease or mortgage are sufficient to pay such debts. Effect of sale on heirs, &c.

2 R. S., 106, § 34.

§ 195. The moneys arising from any mortgage, lease or sale, under this article, must be brought into the office of the surrogate, and distributed by him as follows: Proceeds of sale.

1. He must pay the expenses of the proceedings;

2. In case of sale, he must next satisfy any claim of dower which the widow of the decedent may have upon the property so sold, by the payment of such sum in gross, as upon the principles of law applicable to annuities, is a reasonable satisfaction for such claim, if the widow, by her deed duly acknowledged or proved, consents to accept such sum in lieu of her dower. If, after a reasonable notice for that purpose, no such consent is given, then the surrogate must invest one-third of the gross proceeds of the property in which she has such claim, on bond and mortgage on unincumbered real property within this state, worth at least double the amount invested, and on interest, which interest the surrogate must collect and pay over to the person entitled thereto during her life;

3. The remainder of such moneys arising on the sale, mortgage or lease, so far as necessary to pay all the decedent's debts, must be divided, by the surrogate, among the creditors in proportion to their respective debts, without giving any preference to bonds or other specialties, or to any demands on account of any suit being

brought thereon. Debts of the decedent, not due, are to be paid on a rebate of legal interest.

Notice of the time and place of making the distribution must be published once in each week, for six weeks successively, commencing at least forty-two days before the time appointed, in a newspaper printed in the county, or if there is none, then in the state paper. The surrogate may also publish such notice in such other newspaper as he may deem most likely to give notice to the creditors.

2 R. S., 106, §§ 35–40, 45.

Distribution.

§ 196. Before making the distribution the surrogate must hear proof of, and record, any debts against the decedent which were not previously presented, and established or proved to be unfounded, on the application for the order to sell, mortgage or lease. On such hearing he must proceed according to the rules prescribed by sections 173, 174, 175, 176 and 177; and enter, in his records, a list of such as are thereupon established. Debts which were established under section 177 cannot again be controverted, except upon the discovery of some new evidence to impeach the same, and on due notice to the claimant.

2 R. S., 107, §§ 41, 42.

Surplus to go to heirs, &c.

§ 197. Any surplus remaining after distribution, under section 195, must be distributed among those who were entitled to take such real property by devise [or succession], or the persons claiming under them or holding demands against them which were at the time of the sale liens upon the property, according to their respective rights in the premises.

2 R. S., 107, § 43; Sears *v.* Mack, 1 *Bradf.*, 394 (affirmed, 17 *N. Y*, 445.)

Moneys belonging to minors, &c.

§ 198. If any portion thereof belongs to a minor or to any person who has a temporary interest therein, and the reversion belongs to another person, the surrogate must make such order for the investment thereof, and for the payment of the interest and of the principal, as the supreme court is authorized or required by law to make in analogous cases. Such investments must be secured by bond and mortgage upon unincumbered real property within this state, worth at least double the amount of such investment, and the interest and principal must be distributed by the surrogate, to those entitled thereto, in conformity to the order directing such investment.

Laws of 1850, ch. 150, §§ 1, 2.

§ 199. All securities taken under this article must be taken by the surrogate in his official name, and be delivered to him and kept in his office as part of his official papers, and be delivered to his successor. The surrogate must collect moneys due thereon, from time to time, and distribute the same according to the rights of the parties therein.

Form and custody of securities.

Collection of moneys due on securities.

From 2 R. S., 107, § 45; Laws of 1850, ch. 150, § 2. Extended to all securities.

§ 200. If the plaintiff in any action, under chapter of the CODE OF CIVIL PROCEDURE, elects to prosecute such action against them, after notice of an application having been made to a surrogate, according to the provisions of this article, he loses his right to share in the distribution of the moneys arising on the proceedings on such application.

Effect of prosecuting action against heirs, &c.

2 R. S., 109, §§ 53, 54. The reference is to appendix D.

§ 201. Any person appointed as herein directed, who fraudulently sells any real property of the decedent, contrary to the foregoing provisions, shall forfeit double the value of the property sold, to be recovered by the person entitled to succeed thereto.

Penalty for fraudulent sales.

2 R. S., 110, § 58.

§ 202. Whenever a sale of any real property has heretofore been made, by virtue of an order of the court of probates, or of a surrogate, and a conveyance executed in pursuance thereof, but without the concurrence of any discreet person besides the executor or administrator, as at one time was required by law, and wherever any conveyance has been executed, in pursuance of such sale, without setting forth at large the order of the surrogate directing such sale, or the order confirming the same, as heretofore required, such irregularities may be amended and the sales confirmed by the supreme court.

Irregularities on former sales, how cured.

2 R. S., 110, § 61.

§ 203. Upon application to confirm such sales the court must direct a reference to examine and report touching the proceedings on such sale, and whether any successors or devisees of the real property sold, or persons claiming under them, reside within this state. Upon the coming in of the report, notice must be published in the state paper for eight weeks successively, commencing at least fifty-six days before the day specified, stating that such report has been filed, and where, and requiring all persons interested to appear before the court, at such time and place as the court directs, to show cause why such sale and conveyance should

Reference and notice of hearing.

not be confirmed. If it appears by the report that any successors or devisees of the real property sold, or any person claiming under them, reside within this state, a copy of such notice must be served on them, either personally or by leaving the same at their usual dwelling place, in case of their absence, at least fourteen days before the day specified in the notice.

Id., §§ 62, 63, 64.

When to be confirmed.

§ 204. If, upon the hearing of such application and the examination of the proceedings, it appears to the satisfaction of the court that the surrogate or court ordering the sale had acquired jurisdiction of the subject matter, and of the persons, and that the sale was made fairly and in good faith, it must make such order for confirming the sale and conveyance as it deems equitable, and such sale and conveyance shall from that time be confirmed and valid, according to the terms of the order.

2 R. S., 111, § 65. There has been question made as to whether the court can in this proceeding look at objections to the jurisdiction, and the clause above on that point has been added to settle the question. There seems to be no reason why the fairness of the sale alone is to be drawn in question here, and the parties remitted to another proceeding, perhaps before the same tribunal, to settle the question of jurisdiction, as was done in Bostwick *v.* Atkins, 3 *N. Y.* (3 *Comst.*), 53.

Contracts for lands on what terms to be sold.

§ 205. Where the real property sold under this article consists of an interest under a contract for the purchase of land, whether the decedent was the original purchaser or an assignee of the contract, the sale must be made subject to all payments that may thereafter become due on such contract; and if there are such, the sale must not be confirmed until the purchaser has executed a bond to the executors, administrators or collectors of the decedent, for the benefit and indemnity of them and of the persons entitled to the interest of the decedent in the lands so contracted for, in a penalty double the whole amount of payments thereafter to become due on such contract, with such sureties as the surrogate may approve, conditioned that such purchaser will make all payments for such land that become due after the date of such bond, and will fully and amply indemnify the executors, administrators or collectors of the decedent as the case may be, and the person so entitled, against all demands, costs, charges and expenses, by reason of any covenant or agreement contained in such contract, or by reason of any other obligation or liability of the decedent, on account of the purchase of such lands, and against all other covenants and agreements of the decedent, to the vendor

of such land, in relation thereto. But if there are no payments thereafter to become due on account of such contract, no bond shall be required of the purchaser.

2 R. S., 111, §§ 66, 67, 68; Laws of 1837, ch. 460, § 42.

Assignment of contract sold.

§ 206. On confirming a sale of any interest under a contract for the purchase of land, the surrogate must direct the person appointed to make the sale, to execute an assignment of such contract to the purchaser; which assignment shall vest in such purchaser, his successors and assigns, all the right, interest and title of the persons entitled to the interest of the decedent in the lands sold at the time of sale, and such purchaser has the same rights and remedies against the vendor of such land as the decedent would have had if he had lived.

2 R. S., 111, § 69.

When part of land to be sold.

§ 207. If, in the judgment of the surrogate, a part of the land so contracted may be sold advantageously to the interest of the estate of the decedent, and so that the purchase-money of such part will satisfy and discharge all the payments to be made for such land, according to the contract, he may order such part only to be sold; and, in that case, the purchaser shall not be required to execute any bond.

2 R. S., 112, § 70.

Disposal of proceeds.

§ 208. The moneys arising from any sale, under the three preceding sections, must be paid to the surrogate, and be disposed of by him as follows:

1. He must pay the expenses of the proceedings;

2. He must next satisfy any claim of dower which the widow of the decedent may have upon the lands so sold, in the manner provided in subdivision 2 of section 195; but such claim of dower is hereby declared to extend only to the annual interest, during the life of the widow, upon one-third of the surplus of the moneys arising from such sale which remains after paying all money due from the decedent, at the time of such sale, for the land so contracted and sold;

3. He must apply the residue, in the first instance, to the payment of all money then due from the decedent to the vendor on account of such contract;

4. He must distribute the balance among the creditors and others, in the manner hereinbefore provided in the case of other sales.

2 R. S., 112, §§ 71, 72, 73.

Conveyance on sale of the decedent's interest in part of lands contracted for.

§ 209. Where a portion of the land so contracted is sold, the person appointed must execute a conveyance therefor to the purchaser, which shall transfer to him all the rights of the decedent to the portion so sold, and all rights which shall be acquired to such portion by the executor or administrator, or by the persons entitled to the interest of the decedent in the land sold, at the time of sale, on the perfecting of the title to such land, pursuant to the contract.

2 R. S., 112, § 74.

Contract of sale, how enforced.

§ 210. Upon the payment being made, in full, on a contract for the purchase of land, a portion of which has been sold, according to the preceding provisions, the executors, administrators or collectors have the same right to enforce the performance of the contract which the decedent would have had if he had lived; and any deed executed to them shall be in trust and for the benefit of the persons entitled to the interest of the decedent, subject to the dower of the widow, if any, except for such part of the land, so conveyed, as may have been sold to a purchaser according to the preceding provisions; and as to such part, the deed inures to the benefit of the purchaser.

2 R. S., 112, § 75.

## CHAPTER III.

### LIABILITY OF HEIRS, DEVISEES, LEGATEES AND OTHERS, FOR DEBTS OF THE DECEDENT.

SECTION 211. Liability of those who acquire the property of a decedent.
212. Limits of liability.
213. Apportionment of recovery.
214. Action, how affected by proceedings to sell real property.
215. Contribution.
216. Preference of debts.
217. Defense on the ground of other debts entitled to equality or preference.
218. Debts paid to be estimated as if unpaid.
219. Actions against heirs not to be delayed by infancy.
220. Land aliened.
221. Lis pendens.
222. Judgment to affect real property only.
223. Preference of judgment.
224. Execution against infant heirs.
225. Child born after will made, and witnesses to will.
226. Judgment against decedent enforceable against heirs, devisees, &c.

The provisions of this chapter are modified from those of the Revised Statutes in respect to the form of proceedings so far as to make them harmonize with the present modes of procedure. They are also modified, somewhat, in substance; mainly in respect to rendering all persons who take the property of a decedent, whether by succession or by will, liable for debts in one action, instead of holding them liable to actions in successive classes. This change, it is conceived, will, without any unjust alteration of the principles of liability, prevent circuity of action, and simplify complex cases.

**Liability of those who acquire the property of a decedent.**

§ 211. All persons succeeding to the real or personal property of a decedent by succession, devise or bequest, from him, except such property as is exempt under section , of the CIVIL CODE, are liable jointly and not separately for the debts of such decedent, and in the order in which such property is mentioned in section 184 or 185, as the case may be. Persons who are sought to be charged, under this section, on the ground of their having received legacies, are liable in the order in which their respective legacies would have been applicable to the payment of debts, according to section of the CIVIL CODE.

Limits of liability.

§ 212. No person is liable, under the preceding section, beyond the value of the property so acquired by him, or for any debt or any part of a debt that might, by due proceedings before the surrogate's court or by action, have been collected from the executor, administrator or collector of the decedent. It is incumbent on the creditor to show the matters herein required to render such person liable. Recovery by any creditor against any such person, of the full value of the property received by him, is a bar to any further liability on his part.

Apportionment of recovery.

§ 213. In an action brought under section 273, the plaintiff may recover the value of all the real or personal property acquired by all the defendants who are served or appear in the action, if necessary to satisfy his demand; but the recovery must be had against each class in the order of their liability; and, as between several persons who each acquire property mentioned in the same subdivision of sections 84, 85 or section of the Civil Code, the recovery must be apportioned in proportion to the value of the assets or property received by each; and judgment against each must be entered accordingly. Costs in such actions must be apportioned among the several defendants in proportion to the amount of the recovery against each of them.

Action, how affected by proceedings to sell real property.

§ 214. No action can be brought against the successors or devisees of any real property, in order to charge them with the debts of the testator or intestate, within three years from the time of granting letters upon the estate of the decedent; and if such action is brought after the expiration of that time, upon proof of an application having been made, before the expiration of that period, for an order of sale under article XIII of chapter II of this Code, such action must be stayed by the court in which it is pending until the result of such application. And if an order for the sale is granted thereupon, the action must be dismissed, unless the plaintiff shows that the defendant has, [by succession] or devise, acquired real property of the decedent which was not included in any order of sale; in which case, the judgment in such action does not affect any property so ordered to be sold. But the plaintiff may, on receiving notice of such application, discontinue the action in order to share in the proceeds of the sale.

2 R. S., 109, §§ 53, 54.

Contribution.

§ 215. Any one against whom a recovery is had, pursuant to section 273, may maintain an action jointly against all the defendants of the same or any previous class, in the order of liability, who were not served or did not appear, for contribution; and

may recover of each an amount equal to the amount by which the recovery against the plaintiff would have been reduced, if such defendant had been served or appeared in the original action.

Preference of debts.

§ 216. Any person who is liable for the debts of a decedent, under this chapter, must give such preferences, in the payment of the same, as are prescribed by section 87, or authorized by the surrogate, pursuant thereto, and no others. The commencement of an action by a creditor does not give his debt any preference over others.

2 R. S., 453, §§ 37, 38.

Defense on the ground of other debts entitled to equality or preference.

§ 217. The defendants in any action, under section 273, may show that there are unsatisfied debts of a prior class or of the same class with that in suit. If it appears that the value of the property acquired by them does not exceed the debts of a prior class, judgment must be rendered in their favor. If it appears that the value of the property acquired by them exceeds the amount of debts which are entitled to a preference over the debt in suit, the whole amount which the plaintiff can recover is only such a portion of the excess as is a just proportion to the other debts of the same class with that in suit.

2 R. S., 453, §§ 39, 40.

Debts paid to be estimated as if unpaid.

§ 218. If any debt of a prior class to that on which the suit is brought, or of the same class, has been paid by any defendant, the amount of the debts so paid must be estimated, in ascertaining the amount to be recovered, in the same manner as if such debts were outstanding and unpaid, as prescribed in the preceding section.

2 R. S., 453, § 41.

Actions against heirs, &c., not to be delayed by infancy.

§ 219. Actions against successors or devisees, under the provisions of this article, are not delayed, nor is the remedy of the plaintiffs suspended, by reason of the infancy of any such successor or devisee; but guardians, to defend their rights in such action, must be appointed, as in other cases.

2 R. S., 454, § 43.

Land aliened.

§ 220. Conveyances of real property by any successor or devisee to bona fide purchasers for value and without notice, if made after three years from the grant of letters, are valid even as against creditors of the decedent. Such conveyances, if made at any time, protect such property from judgment and execution in any action subsequently commenced under section 273.

The latter clause is from 2 R. S., 455, § 51. The first is new.

Lis pendens

§ 221. Except where the successor or devisee has aliened the property before the commencement of the action, such actions are to be deemed actions affecting the title to real property, within section 132 of the Code of Procedure, and the plaintiff may file a notice of the pendency of the action, with the effect therein prescribed.

Judgment to affect real property only.

§ 222. On a recovery against a successor or devisee, under section 273, unless it appears that before the commencement of the action he had aliened the real property or some part thereof, the judgment must direct that the amount recovered of him be collected out of such real property and not otherwise.

2 R. S., 454, §§ 47, 49.

Preference of judgment.

§ 223. A judgment duly docketed, in an action, under section 273, against any person who acquired any real property of the decedent by succession or devise, has preference, as a lien on the real property in question, over judgments against such person, for any debt or demand in his own right.

2 R. S., 454, § 48

Execution against infant heirs.

§ 224. An attorney issuing execution on such judgment must indorse thereon the names of infant defendants, if any, with a direction to the sheriff not to execute the same against them until the expiration of one year from the date of the judgment.

2 R. S., 455, §§ 54, 55.

Child born after will made, and witnesses to will.

§ 225. A child born after the making of a will who is entitled to succeed to a portion of the testator's property, or any person who, being a witness to a will, is entitled to recover any portion of the testator's property from the legatees and devisees, has the same rights and remedies to compel a distribution or partition of the property, and contribution, as other persons entitled to succeed; and are equally liable with them, under the provisions of this chapter. Such person may recover of the legatees and devisees the portion of the testator's property which belongs to him.

2 R. S., 456, §§ 62–66.

Judgment against decedent enforceable against heirs, devisees, &c.

§ 226. The cases in which a judgment against the decedent may be enforced against his heirs, devisees, legatees and others, are prescribed by section 376 of the Code of Procedure.

## CHAPTER IV.

### THE SURROGATE'S COURT, AND PROCEEDINGS THEREIN.

SECTION 227. Surrogate's court in each county.
228. Jurisdiction of surrogate's court.
229. Exclusive jurisdiction.
230. Presumption of jurisdiction.
231. Effect of erection of new county.
232. Surrogate's court to be held, by whom.
233. Officer holding court denominated surrogate.
234. Disqualification.
235. Vacancy or disability, how declared.
236. Removal of proceedings when surrogate proves to be a witness.
237. General powers of surrogate.
238. Resignation of executor.
239. Power of surrogate after revocation of letters.
240. Power to compel performance of duty.
241. Power to open decree.
242. Mistakes and amendments.
243. Appearance.
244. Surrogate, &c., when not to act as counsel or attorney.
245. Court, when held.
246. Seals.
247. Surrogate's office, and expenses thereof.
248. Records.
249. Files.
250. Successor.
251. Bonds to be acknowledged or proved.
252. Fees to be received for services.
253. Signing copies of orders, &c.
254. Annual report to secretary of state.
255. Action on official bond.
256. Limitations.
257. Citations and orders, and service thereof.
258. Notice of proceedings to appoint guardian.
259. Effect of order directing payment to be made by executor, &c.
260. Process.
261. Docketing transcripts.
262. Aged, sick and infirm witnesses.
263. Examination of such witnesses in other counties.
264. Professional communications not privileged.
265. Death, &c., not to abate any proceeding.
266. Parties in interest.
267. Trial of issues of fact.
268. Costs.

In this and the following chapter, provisions, the sources of which are not otherwise indicated, are taken in sub-

stance from the CODE OF CIVIL PROCEDURE, as reported complete. Much of these two chapters more appropriately belongs to that Code, and is presented in this report in order to give a complete view of this court and the system of procedure in these cases.

Surrogate's court in each county

§ 227. There is in each county a surrogate's court, which is a court of record, with the general powers of courts of record,[1] except where otherwise specially provided, and with the jurisdiction conferred by the next section.

[1] Many of these powers have been in substance conferred by successive statutes, and there seems no reason for preserving the distinction. See CODE OF CIVIL PROCEDURE, as reported complete, p. 16, § 20, *note*.

Jurisdiction of surrogate's court.

§ 228. The surrogate's court has jurisdiction:

1. To take proof of wills and to grant letters of administration and of collection in the cases prescribed in

The reference is to sections 1 and 2 of this Appendix.

2. To grant and revoke letters testamentary, and of administration and collection;

3. To direct and control the conduct and settle the accounts of executors, administrators, collectors, testamentary trustees, committees and guardians;

4. To enforce the distribution of the estates of decedents, and the payment of debts and legacies, whether disputed or undisputed;

5. To order the sale, mortgage or lease, for the payment of debts, of real property [devised by] decedents;

6. To appoint and remove guardians;

7. To take the care and custody of the person and estate of an insane person or habitual drunkard residing in the county, and to appoint and remove committees;

8. To direct the admeasurement of dower;

9. To exercise the powers conferred upon it by other provisions of the Codes of this state, and in any other case now or hereafter prescribed by statute.

Taken from 2 R. S., 3d ed., 318, § 1, except subdivision 7, which is new, but deemed a necessary and proper provision. This jurisdiction now rests with the county courts.

Exclusive jurisdiction.

§ 229. The jurisdiction acquired by a surrogate's court over a matter or proceeding, is exclusive of that of another surrogate's court, except when otherwise specially provided. And when any

proceeding is commenced in the surrogate's court of any county, all further proceedings in respect to the same matter, must be continued in that court.

Taken from 2 R. S., 3d ed., 322, § 26.

Presumption of jurisdiction.

§ 230. In all cases, jurisdiction of the proceeding in relation to the estate of a decedent, is to be deemed conclusively established upon any verified allegation of the jurisdictional fact, and when the citation or order was duly served or published, and the surrogate has exercised jurisdiction without reversal or appeal.

This section is new, and conformable to the decisions. Bumstead *v.* Read, 31 *Barb.*, 661.

Effect of erection of new county

§ 231. In all cases of the erection of a new county hereafter, the surrogate of such county may take the proof of wills, and grant letters, in cases where the decedent, at the time of his death, resided within the territory embraced within such county.

Laws of 1843, ch. 177, § 4.

Surrogate's court to be held, by whom.

§ 232. In those counties in which the office of surrogate is a separate office, the surrogate's court is held by the incumbent thereof. In other counties it must be held by the county judge In case of the inability of the surrogate, or his disqualification, as provided in section 296, or absence or of a vacancy in his office, the court must be held by the county judge, or if he is unable or absent, or disqualified to act, or his office is vacant by the special county judge, in a county where there is such an officer. If there is no county judge, or special county judge, or he is unable or absent, or disqualified to act, it must be held by a justice of the supreme court, if there is one within the county; if not, then by the district attorney. In the city of New York, if the surrogate is unable to act, or disqualified as provided in section 296, or absent, or there is a vacancy in his office, any justice of the supreme court of the first judicial district may act as surrogate during the disability, absence, disqualification or vacancy.

The bond which any officer must give before acting as surrogate, is prescribed by section 934 of the POLITICAL CODE.

Laws of 1847, ch. 280, § 37; Laws of 1830, ch. 320, §§ 20, 21; as amended 1843, ch. 121, §§ 1, 2; Laws of 1847, ch. 470, § 32 (same statutes, 3 R. S., 5th ed., 165, 166, 363, §§ 61, 62, 63, 70, 71), modified by providing that a justice of the supreme court shall be resorted to before resorting to the district attorney, and by adding the provision relating to the city of New York.

Officer holding court denominated surrogate.

§ 233. The officer by whom a surrogate's court is held, as authorized by law, is in this Code denominated the surrogate. Whatever officer acts as surrogate, the same seal hereinafter provided for as the seal of the court, must be used; and the proceedings must be recorded, and the papers filed, in the same records and files which are hereafter directed to be kept in the office of the court.

Disqualification.

§ 234. No surrogate can act as such in relation to any estate or proceeding:

1. If he has or claims an interest by succession, by will, as creditor, or otherwise;

2. If he is so related to any person having or claiming such interest, that he would, by reason of such relationship, be disqualified as a juror;[1]

3. If he is a subscribing witness to any testamentary paper or a witness to any nuncupative will;[2]

4. If he is named as executor or trustee in any testamentary paper;

5. If he has acted as counsel or attorney for the decedent or for any person, in relation to the estate, will or proceeding in question.[3]

No surrogate is disqualified under subdivision 2, unless an objection on that ground is made at the first hearing before him in the matter.[4] The disqualification mentioned in subdivision 3, ceases when such will has been finally admitted to or refused probate, and the time for filing allegations has passed; and the disqualification mentioned in subdivision 4 ceases, if the will is finally refused probate.

[1] 2 R. S., 275, § 2; id., 79, § 48, as amended by Laws of 1830, ch. 320, § 19.

[2] 3 R. S., 79, § 48, as amended, *supra*.

[3] Laws of 1847, ch. 280, § 81; same stat., 2 R. S., 5th ed., 466, § 8.

[4] This clause is from Laws of 1844, ch. 300, § 6.

Vacancy or disability, how declared.

§ 235. A vacancy in the office, or the absence or disability of a surrogate from any cause, must be determined by an order of the supreme court in the same judicial district or in an adjoining county, entered with the clerk of the proper county. The order may be made upon affidavit, without notice, or upon notice, or upon an order to show cause, in the discretion of the court, and may be vacated upon due cause shown.

§ 236. If at any time it appear that the surrogate is a necessary and material witness for any party in interest in a matter pending before him, any party in interest may apply to any justice of the supreme court of the same judicial district or an adjoining county, for an order to remove the proceedings; and if such justice is satisfied that the surrogate is such witness, he must order the proceedings to be certified to him, and proceed therein as surrogate.

Removal of proceedings when surrogate proves to be a witness.

This section is new.

§ 237. Every surrogate has power:

General powers of surrogate.

1. To issue subpœnas, under the seal of his court, to compel the attendance of any witness residing or being in any part of the state, or the production of any paper, material to any inquiry pending in his court;[1]

2. To administer oaths and take acknowledgments, whenever necessary in the exercise of the powers and duties of the office;[2]

3. To issue commissions to take the testimony of any witness without this state;[3]

4. To issue citations and orders to show cause to parties in all matters cognizable in his court; and, in the cases prescribed by law, to compel the appearance of such parties;[4]

5. To enjoin any administrator, executor, collector, testamentary trustee, guardian or committee, while any proceeding is pending, from acting until the further order of the court;[5]

6. To enforce all lawful orders, process and decrees of his court, by attachment, execution or otherwise, against the persons of those who fail to comply therewith or to execute such process. Process may be issued by the surrogate to be executed in any county of the state and to be returned before him;[6]

7. To exemplify, under the seal of the court, all transcripts of records, papers or proceedings therein; which shall be received in evidence in all courts, with the like effect as the exemplifications of the records, papers and proceedings of other courts of record;[7]

[1] 2 R. S., 221, § 6, subdiv. 1, as amended by Laws of 1830, ch. 320, § 66; 2 R. S., 58, §§ 10, 11, as amended by Laws of 1837, ch. 460, § 18.

[2] Laws of 1837, chap. 460, § 62, last clause, with a power to take acknowledgments of bonds, &c., added.

[3] Laws of 1837, ch. 460, § 77.

[4] 2 R. S., 222, § 6, subdiv. 3.

[5] Laws of 1837, ch. 460, § 61.

[6] 2 R. S., 222, § 6, subdiv. 4; Laws of 1837, ch. 460, § 66; 2 R. S., 58, §§ 10, 11, as amended by Laws of 1837, ch. 460, § 18.

[7] 2 R. S., 222, § 6, subdiv. 5.

8. To preserve order in his court, and punish contempts, civil and criminal, as a court of record;[1]

9. To adjourn any proceeding pending before him, from time to time.[2]

[1] Modified from 2 R. S., 222, § 6, subdiv. 6.
[2] Laws of 1837, ch. 460, § 62, first clause.

Resignation of executor.

§ 238. The surrogate may, on application of an executor, administrator, collector, or testamentary trustee, and on notice to the parties interested in the estate, accept his resignation and discharge him from the trust, and appoint successors, upon such conditions as he judges proper for the security of the estate.

This and the five following sections are new.

Power of surrogate after revocation of letters.

§ 239. The surrogate has the same jurisdiction over a collector, administrator or executor, whose letters have been revoked, in all matters concerning the estate, as he had before such revocation, until such collector, administrator or executor has fully complied with all orders of the surrogate.

Power to compel performance of duty.

§ 240. The surrogate may, by order, attachment and commitment, compel any executor, administrator, collector or testamentary trustee to perform any duty imposed upon him by any will or by any provision of this Code, or by the surrogate under authority of any such provision.

Power to open decree

§ 241. The surrogate has the same powers to open, vacate, modify or set aside, or to enter as of a former time, decrees or orders of his court, that courts of general jurisdiction and of record have.

Mistakes and amendments.

§ 242. The provision of chapter six of title six of the Code of Procedure, entitled "Of Mistakes in Pleading and Amendments," apply to all proceedings in surrogates' courts, so far as the same can be applied to the substance and subject matter of the proceeding, without regard to its form.

Appearance

§ 243. A party may appear in proceedings in which he is concerned, either in person or by attorney or counsel. Where a party appears by attorney, service of papers in the proceeding may be made upon the attorney, except where personal service is required by the provisions of this Code or by the order of the surrogate.

Surrogate, &c., when not to act as counsel or attorney.

§ 244. A surrogate cannot be counsel or attorney in a civil action, for or against an executor, administrator, collector, guardian or minor, committee or other person, over whom or whose

accounts he would, by law, have jurisdiction, whether such action relates to the business of the estate or not. No surrogate can act as an attorney, counselor or solicitor in his court, nor in any cause originating in such court; nor shall any son, partner or clerk of, or person connected in law business with, any surrogate, act as attorney, solicitor or counselor, in any proceeding before such surrogate, or originating before such surrogate.

The latter provision is from Laws of 1844, ch. 300, § 4; and Laws of 1847, ch. 470, § 51.

Court, when held.

§ 245. The surrogate's court is at all times open for the transaction of business within its jurisdiction; but it is the especial duty of the surrogate to attend at his office on Monday of each week, and there hold court.

When the surrogate's court is held by the county judge, it may be held at the time and place at which county courts are held, and at such other times and places within the county as public interests require.

2 R. S., 221, § 2; Laws of 1847, ch. 280, §§ 32, 33.

Seals.

§ 246. The seals now used by these courts shall continue to be so used until and including December 31st, 186 . After that day the seals devised as follows shall be the seals thereof. At least thirty days before that day, the secretary of state shall procure and transmit to each surrogate, at the expense of the state, a seal with the arms of the state engraved in the center thereof and with this legend: "Surrogate's Court, ——— County, New York," inserting the name of the county.

Whenever a new county is erected, and whenever a seal is injured so that it cannot be conveniently used, the secretary of state shall procure and transmit, at the expense of the state, a similar seal. If such seal is prepared to replace a former seal, it must be similar in all respects thereto, and the surrogate must destroy the former seal.

2 R. S., 221, §§ 4, 5; 277, § 7; Code of Civ. Pro., as reported complete, § 209.

Surrogate's office, and expenses thereof.

§ 247. The surrogate, or, where there is no separate office of surrogate, the county judge must keep an office open at all reasonable hours, suitable and convenient for the transaction of the business, and for the deposit and safe keeping of the public books and papers under his charge. If such office be not provided by the supervisors of the county, the surrogate or county judge must provide the same at the public expense, and the supervisors shall raise the requisite amount by tax. He may hold his court at any

other place in his county which he may from time to time appoint. He must also provide suitable cases for the books and papers of his office, the expense of which is a county charge. They belong to the county, and must be delivered by the surrogate to his successor in office.

Records.

§ 248. The following books must be kept:

1. A record of wills, in which must be recorded all wills and codicils, with the certificates of probate thereof;

2. A record of appointment of executors, administrators, collectors, testamentary trustees, committees and guardians, and revocations of all such appointments;

3. A record of all orders and decrees; a memorandum of executions issued thereon, with a note of satisfaction when satisfied;

4. A record of the appointment of admeasurers of dower, with all orders relating to the same, and the admeasurers' reports;

5. A book, in which must be entered appointments of special guardians, appraisers, referees and arbitrators; orders relating to the production of a will, to removal of executors, administrators, collectors, committees or guardians; in relation to sureties for executors, administrators, collectors, committees or guardians; and all other orders which he is required to make in writing, and not required to be recorded in some other book;

6. An account book, in which must be kept an account of all securities and moneys received by him, in a separate account for each estate;

7. A record of all testimony, whether taken by the court or on a commission or otherwise, respecting the proof of a will;

8. A book of fees, in which must be entered the items of all fees for services of the surrogate in each particular proceeding or estate, and when and by whom paid.

To each of such books there must be attached an alphabetical index, securely bound in the volume, referring to the entries therein by the page of the book. He must also keep a general index of each set of said books. These books must at all proper times be open to the inspection of any person paying the fees allowed by law for such examination.

Modified from 2 R. S., 222, § 7, as amended by Laws of 1827, ch. 460, §§ 2, 3.

Files.

§ 249. Every surrogate must file and preserve all papers in proceedings before him or belonging to the court; and all such

papers and the books kept by him belong and appertain to his office and must be delivered to his successor.

2 R. S., 223, § 8.

§ 250. The successor in office of a surrogate has power to complete any unfinished business commenced by his predecessor. **Successor.**

§ 251. Every bond required to be filed with a surrogate must be proved or acknowledged by the obligors before it is filed, in the same manner as a deed. **Bonds to be acknowledged or proved.**

Laws of 1851, ch. 175, § 2.

§ 252. For the following services of surrogates, the following fees, and no other, are allowed: **Fees to be received for services.**

1. Drawing proof of a will, when contested, or any other proceeding before him, for which no specific compensation is provided, fifteen cents for every folio;

2. Drawing every petition in any proceeding before him, not otherwise provided for, including the verification, fifty cents;

3. Every certificate of the proof of a will, when contested, indorsed thereon, fifty cents; and for any certificate upon exemplifications of records or papers filed in his office, or upon the papers transmitted upon appeal, fifty cents;

4. Drawing, copying and approving of any bond, fifty cents;

5. Drawing, copying and recording every necessary paper, and drawing and entering every necessary order, and for rendering every other service necessary to complete proceedings on the appointment of a general guardian of a minor, three dollars; and for the like services in appointing the same person guardian for any other minor of the same family, at the same time, one dollar and fifty cents;

6. Drawing, entering and filing a renunciation, twenty-five cents;

7. A citation or order to show cause, in cases not otherwise provided for, to all parties in the same proceeding, residing in any one county, fifty cents; and to all parties without the county, twenty-five cents;

8. A subpœna for all witnesses in the same proceeding, residing in one county, twenty-five cents;

9. For every copy of a citation, order to show cause, or subpœna, furnished by a surrogate, twelve cents;

10. A warrant of commitment or attachment, fifty cents;

11. A discharge of any person committed, fifty cents;

12. For drawing and taking every necessary affidavit, upon a return of the inventory, fifty cents;

13. For serving notice of any revocation, or other order or proceeding required by law to be served, twenty-five cents;

14. For swearing each witness in cases where a gross sum is not allowed, twelve cents;

15. For searching the records of his office for any one year, twelve cents; and for every additional year, six cents; but no more than twenty-five cents shall be charged or received for any one search;

16. Recording every will, with the proof thereof, letters testamentary, letters of administration, reports of commissioners for the admeasurement of dower, and every other proceeding required by law to be recorded, including the certificate, if any, at the foot of the record, when the recording is not specifically provided for in this act, ten cents for every folio;

17. For the translation of any will from any other than the English language, ten cents for every folio;

18. Copies and exemplifications of any record, proceeding or order had or made before him, or of any papers filed in his office, transmitted on an appeal, or furnished to any party on his request, six cents for every folio, to be paid by the person requesting them;

19. For making, drawing, entering and recording every order for the sale of real property, and every final order or decree on the final settlement of accounts, one dollar and fifty cents; and for the confirmation of the sale of real property, seventy-five cents; and for making, drawing, entering and recording any other order or decree, when the same is not otherwise provided for twenty-five cents;

20. Hearing and determining, when the proof of a will or the right to administration or appointing a guardian is contested, two dollars;

21. Taking, stating and determining upon an account rendered upon a final settlement, or determining and deciding the distribution of personal property, if contested, two dollars for each day necessarily spent therein, not exceeding three days;

22. For hearing and determining any objections to the appointment of an executor or administrator, or collector, or any application for his removal, or for the removal of any guardian, or any application to annul the probate of a will, two dollars;

23. For hearing and determining upon an application to lease, mortgage or sell real property, two dollars;

24. For drawing and recording all necessary papers, and drawing and entering all necessary orders on applications for letters of administration, when not contested, and for all services necessary to complete the appointment of administrators, and for the appointment of appraisers, five dollars; but in cases where a citation is necessary, seventy-five cents in addition;

25. For investing, for the benefit of any party, any legacies, or the distributive shares of the estate of any decedent, in the stocks of this state, or of the United States, one per cent for a sum not exceeding two hundred dollars; and for any excess, one-quarter of one per cent; for investing the same on bond and mortgage of real property, one-half of one per cent, for a sum not exceeding two hundred dollars; and one-quarter of one per cent for any excess;

26. For receiving the interest on such investments, and paying over the same for the support and education of any person, one-half of one per cent;

27. Appointing a guardian to defend any infant who may be a party to any proceeding, fifty cents; but where there is more than one minor of the same family, and the same guardian is appointed for all, twenty-five cents for each additional minor; and no greater or other fee shall be charged for any service in relation to such appointment;

28. Hearing and determining upon the report of commissioners for the admeasurement of dower, one dollar;

29. For distributing any moneys brought into his office on the sale of real property, two per cent; but such commission can not in any case exceed twenty dollars for distributing the whole money raised by such sale, and no executor or other persons authorized to sell any real property by order of any surrogate may be allowed any commission for receiving or paying to the surrogate the proceeds of such sale, but must be allowed their expenses in conducting such sale, including a reasonable compensation for every deed prepared and executed by them thereon, to be allowed by the surrogate, and a compensation not exceeding two dollars a day for the time necessarily occupied in such sale;

30. But no fee shall be taken by any surrogate in any case when it shall appear to him, by the oath of the party applying for letters testamentary or of administration, that the goods, chattels and credits do not exceed the value of one hundred dollars,

nor shall he take any fee for copying any paper drawn by him or filed in his office, except as above provided;

One hundred dollars substituted for fifty.

31. For drawing and recording all necessary petitions, depositions, affidavits, citations and other papers, and for drawing and entering all necessary orders and decrees, administering oaths, appointing guardians, *ad litem*, and appointing appraisers, and for rendering every other necessary service in cases of proof of will, and issuing letters testamentary, when not contested, and the will does not exceed fifteen folios, surrogates may charge twelve dollars; and where the will exceeds fifteen folios, ten cents per folio for recording such excess, and six cents per folio for the copy of such excess, to be annexed to the letters testamentary;

32. For all fees on filing the annual account of any guardian, when the surrogate draws and takes the affidavit of the guardian, and for examining such accounts, fifty cents; but when the same shall not be drawn nor taken by him, he shall charge no fees;

33. For any necessary travel in taking the examination of a witness under section 324, ten cents per mile going and returning;

34. No charge can be made for drawing, copying or recording his bill of fees in any case, nor for affixing the seal of the court to any instrument above mentioned.

Laws of 1844, 445, ch. 300. Subdivision 33 is from Laws of 1837, ch. 460, § 68.

Signing copies of orders, &c.

§ 253. It is not necessary for the surrogate to sign copies of original orders, citations, subpœnas, or other papers, to be served or published; but he may sign such original, and his assistants or clerks may sign such copies in his name. This section does not apply to exemplifications under the seal of his court.

This section is new.

Annual report to secretary of state.

§ 254. Each surrogate must annually, between the first and twentieth day of January, at his own expense, report to the secretary of state:

1. A verified statement of all his fees received or charged, and all his disbursements, during the year preceding, stating particularly every item thereof;[1]

2. A statement of the names of all decedents who were not inhabitants of this state at the time of death, upon whose estates letters have been issued in his court during the year past.[2]

[1] Laws of 1844, ch. 300, § 5.

[2] Modified from 2 R. S., 80, § 59, by requiring a statement, instead of a copy of wills and letters.

§ 255. The mode of proceeding on a breach of the official bond of the surrogate is provided by the CODE OF CIVIL PROCEDURE. Action on official bond.

Code of Civ. Pro., as reported complete, §§ 1022–1032, tit., "Actions on official securities," &c.

§ 256. Except so far as is herein otherwise provided, the existing provisions of law limiting the time for the commencement of actions apply to limit the time for asserting any demand in proceedings in the surrogate's court, so far as the same can be applied to the substance and subject-matter of the proceeding without regard to its form. Limitations

This section is new, though conformable to decisions. Paff *v.* Kinney, 1 *Bradf.*, and cases there cited.

§ 257. Original process out of the surrogate's court, by which a proceeding is commenced, consists of orders to show cause, and citations: Citations and orders and service thereof.

1. An order to show cause may be returnable at any time in the discretion of the surrogate, and may be served at any time previous to the return day, but in other respects must be served in the same manner as a citation;

2. A citation must be served on such as reside or are sojourning in the county of the surrogate, or an adjoining county, at least eight days before the return day thereof, by delivering a copy to the person to whom it is directed, or by leaving a copy at the abode or residence or place of sojourn of such person, with some person of suitable age and discretion, under such circumstances as shall satisfy the surrogate that the copy came to the knowledge of the person to be served with it, in time for him to attend the proceeding;

3. On such as reside or are sojourning in any other county in this state, at least fifteen days before the return day thereof, in the same manner;

4. On such as reside, or are, without this state, not less than fifteen nor more than forty days before the return day thereof, in the same manner; or it may be served by publishing a copy once in each week for six weeks, commencing at least forty-two days before the return day, in the state paper, and in such other papers published in places where parties in interest reside, or are sojourning, as the surrogate may direct, and by depositing a copy in the post office, directed to the person to be served at his place of residence or sojourn, and paying the postage thereon. But if any reside out of the United States and out of the provinces of Canada, and there be no personal service, the citation must be pub-

lished and mailed as aforesaid, three months previous to the return day;

5. Where the place of residence or sojourn cannot be ascertained, or if ascertained, the party is absent and there is no person on whom service can properly be made under subdivision 2, or where he has no residence, service may be made by the like publication.

The words "on return of the order," or citation, when used in this Code, mean after due service of the order.

By this section uniform rules are prescribed for the time and mode of serving all citations. The provision is substantially adopted from Laws of 1837, ch. 460, § 8, as amended Laws of 1840, ch. 384, § 1; same stat., 2 R. S., 5th ed., 147, § 53.

Notice of proceedings to appoint guardian.

§ 258. Where, by the provisions of this Code, the appointment of a guardian for a minor is required in any proceeding, if such minor is within the state, five days' previous notice, in writing, of the intention to apply for the appointment of a guardian must be served upon him by delivery to him personally, and in case such minor be under the age of fourteen years by delivery also to his father, mother or guardian, or if there be none within the state, then to any person having the care and control of such minor, or with whom he shall reside or sojourn, or in whose service he shall be employed.

2 R. S., 100, § 4, as amended by Laws of 1837, ch. 460, §§ 38, 39; modified to harmonize with the provisions of the CODE OF PROCEDURE respecting service of summons, &c., upon minors.

Effect of order directing payment to be made by executor, &c.

§ 259. Any order made under sections 97, 101, 151 and 152, shall be conclusive evidence that there are sufficient assets to satisfy the amount which is directed to be paid or for which execution is allowed to issue, until it is set aside or reversed on appeal.

From 2 R. S., 116, §§ 19, 20.

Process.

§ 260. Orders for the payment of money may be enforced by execution or otherwise, in the same manner as judgments for the payment of money in the supreme court; except that in the surrogate's court, all process is issued by the surrogate. Executions, warrants, and other process issued by a surrogate or any officer under any provision of this Code must be executed by the sheriff or coroner of the county to which they are sent to be executed, in the same manner and with the same powers, responsibilities and fees, as in case of process issued from the supreme court.

Docketing transcripts.

§ 261. A transcript of any order of a surrogate requiring an executor, administrator or collector to pay money, may be filed and docketed in the clerk's office of any county, and thereupon has the same force and effect as a judgment in a civil action.

Aged, sick and infirm witnesses.

§ 262. If any aged, sick or infirm witness, whose testimony is material and necessary in any proceeding before him, be in the same county with the surrogate, it is the duty of the surrogate, when required, and on notice to all parties in interest, to proceed to the residence of the witness, and there, as in open court, take the examination of such witness.

Laws of 1837, ch. 460, § 12; same statute, 2 R. S., 5th ed., 148, § 58, as amended by Laws of 1841, ch. 129; §§ 1, 2; same statute, 2 R. S., 5th ed., 149,* § 63.

Examination of such witnesses in other counties.

§ 263. If such aged, sick or infirm witnesses is in a different county from the surrogate, the surrogate may proceed to the place where such witness is, and take his examination in the same manner and with the like effect as if taken in his own county; or he may, in his discretion, direct, by order, that such witness be examined before the surrogate of the county in which the witness is, and specify some day on or before which the order shall be delivered to such other surrogate, a copy of which order, under the seal of the surrogate making the same, together with the original will, when the proceeding is a matter of probate, must be transmitted by him to such other surrogate; the latter must, on the day therein mentioned, or on such as he may adjourn the same to, proceed to take such examination in the same manner, and with like effect as if he possessed original jurisdiction thereof. The examination must be reduced to writing and subscribed by the witness; and, together with a statement of the proceedings, must be certified by the surrogate taking the same, under his seal of office, and returned without delay to the surrogate who directed such examination, and such examination has the same effect as if taken before the latter surrogate.

From Laws of 1837, ch. 460, §§ 13, 14, 15; same statute, 2 R. S., 5th ed., 148, §§ 59, *60, 61.

Professional communications not privileged.

§ 264. No attorney, counsel or solicitor, and no person practising physic or surgery, shall be excused from answering any relevant question as a witness in proceedings for the probate or contest of probate of a will or any testamentary paper, on the ground that he acquired the information which he is required to disclose while acting for the decedent in a professional capacity.

This section is new.

Death, &c., not to abate any proceeding.

§ 265. The death, removal or disqualification of any executor, administrator, collector or other person appointed in the surrogate's court, does not in any wise abate any proceeding in which he was concerned; but on the appointment and qualification of a successor, the same may be continued in the name of the successor as if no change had been made.

Parties in interest.

§ 266. The term "parties in interest," as used in this Code, includes executors, administrators, collectors, devisees, legatees, husband, widow, next of kin, heirs-at-law, or successors, creditors, and all other parties having any rights in, or claims against, the estate which may be affected by the proceeding, and also sureties on the official bond. The surrogate shall hear and determine issues as to interest; but objections to an appointment may be heard, or an inventory, account, or increased security, may be ordered, upon a sufficient statement of interest positively verified, without the issue of interest being tried.

This section is new.

Trial of issues of fact.

§ 267. Except where otherwise specially provided, issues of fact, joined in any surrogate's court, to be tried by a jury, must be tried in the county court of the same county.

Laws of 1847, ch. 280, part of § 45.

Costs.

§ 268. Costs and disbursements may be awarded, to be paid personally, or out of the estate or fund, in any proceedings before the surrogate; but such costs cannot exceed those allowed in the supreme court, for a trial in civil actions.

This section is new. It is taken from the CODE OF CIVIL PROCEDURE, as reported complete, 1850, p. 656, § 1560. By the present law costs are regulated by the old Common Pleas fee bill.

## CHAPTER VI.

### APPEALS.

SECTION 269. When allowed.
270. Who may appeal.
271. May be on questions of law or fact.
272. Manner of taking appeal.
273. Time of appealing.
274. Stay of proceedings.
275. Undertaking on appeal from order for payment of money.
276. On appeal from commitment.
277. Service of copy, justification and filing.

SECTION 278. Determination of appellate court.
279. Reference in appellate court.
280. Costs on appeal.
281. Proceedings below after determination of appeal.

§ 269. An appeal may be taken to the supreme court from any judgment or order in a surrogate's court; except original process, and except orders which rest purely in the discretion of the surrogate, and do not involve the merits. When allowed.

Modified from 2 R. S., 609, § 104, as amended by Laws of 1847, ch. 280, § 17, by including orders in admeasurement of dower, and excepting discretionary orders not involving merits.

§ 270. The appeal can only be taken by a party aggrieved who appeared and moved for or opposed the order or judgment appealed from, or who, being entitled to be heard thereon, had no notice or opportunity to be heard, the latter fact to be shown by affidavit, filed and served with the notice. Who may appeal.

§ 271. The appeal may be taken upon questions of fact or of law, and must be heard upon a statement of the case, to be made and settled before the surrogate, in the same manner as provided by law in the case of appeal on a trial by the court in civil actions. The appellate court may hear further testimony. May be on questions of law or fact.

The latter provision is new, but conformable to the decisions.

§ 272. The appeal is made by the service of a notice on the adverse party, stating the appeal from the order or judgment, or some specified part thereof, and filing a copy of the notice in the office of the surrogate and of the county clerk, together with an undertaking with sufficient surety, approved by the surrogate, and filed in the surrogate's office, to the effect that the party will prosecute his appeal with due diligence to a determination, and will pay all costs that may be adjudged against him in the supreme court thereon. Manner of taking appeal.

§ 273. All appeals must be taken within thirty days after the entry of the order, except where the appellant had no notice, or opportunity to be heard, in which case his appeal must be taken within three months after the entry of the order. Time of appealing.

Modified from 2 R. S., 608, § 90; 610, §§ 105-107, 118, 119.

§ 274. Except in the cases mentioned in the two following sections, such appeal stays all proceedings on the order appealed Stay of proceedings.

from, for the term of five days only, unless a justice of the supreme court within the same judicial district or an adjoining county direct a suspension of the order until the appeal is determined. Such a suspension stays all proceedings, unless the same is vacated by the justice who granted it, or another justice of the same district or an adjoining county.

Undertaking on appeal from order for payment of money.

§ 275. An appeal is from an order directing any executor, administrator, collector, testamentary trustee, guardian or committee, or any person appointed in the surrogate's court to make any payment or deliver any property, is not effectual for any purpose, unless, at the time of filing the appeal, a written undertaking is executed on the part of the appellant, by at least two sureties, to the effect that, if the order appealed from, or any part thereof, is affirmed, the appellant will pay the amount or deliver the property directed to be paid or delivered by the order as affirmed, and all damages which may be awarded against the appellant on the appeal.

2 R. S., 116, § 24, modified in form to harmonize with the present practice in civil actions.

On appeal from commitment.

§ 276. On appeals from orders directing commitment of any executor, administrator, collector, testamentary trustee, guardian or committee, or any person appointed in the surrogate's court, for disobedience of any order of the surrogate or for any neglect of duty, or the commitment of any person refusing to obey any subpœna, or to testify, when required, according to law, the proceedings cannot be stayed unless the party committed, at the time of filing the appeal, gives a bond executed on the part of the appellant, by at least two sureties, to be approved by the supreme court, and in a sum to be fixed by the court, conditioned that if the order appealed from be affirmed, such person will, within twenty days after such affirmance, surrender himself to the custody of the sheriff to whom he has been committed, in obedience to such order or process. If the condition of such bond is violated, it may be prosecuted in the same manner and with the same effect as an administrator's bond, and the proceeds distributed in the same way.

From 2 R. S., 611, §§ 111–115.

Service of copy, justification and filing.

§ 277. Copies of bonds and undertakings given under this chapter, including the names and residence of the sureties, must be served on the adverse party, and the sureties must justify in the mode prescribed by sections 340 and 341 of the CODE OF PROCEDURE. The security must be filed with the surrogate from whom the appeal is taken.

§ 278. The supreme court may reverse, modify or affirm the decision appealed from in any respect mentioned in the notice of appeal; and if a reversal or modification is founded upon any question of fact, which is necessary or proper to be tried by a jury, the court may make an order stating distinctly and plainly the questions of fact to be tried, and directing a trial at the next circuit court in the county.

**Determination of appellate court.**

New trials of such questions may be granted in such cases by the court as in civil actions.

From 2 R. S., 66, 67, as modified by Laws of 1847, ch. 280, § 17. CODE OF PROCEDURE, § 72.

§ 279. Appeals which prevent the issue of letters testamentary, of administration or collection, have preference in the supreme court and in the court of appeals over all except criminal cases, and may be moved out of their order. Orders for trial and motions for new trial, under the preceding section, have preference on the calendar.

**Preference in appellate court.**

The former provision is from Laws of 1860, 270, ch. 167, § 2, extended to the supreme court.

§ 280. Costs of the appeal, and of any trial of a question of fact thereon, may be awarded to the successful party, to be paid either out of the estate or by the unsuccessful party, in the discretion of the appellate court.

**Costs on appeal.**

Modified from 2 R. S., 608, § 96; 2 id., 67, §§ 61, 62.

§ 281. The final decision of the appellate court must be certified to the surrogate's court; and the latter must proceed in the matter according to the decision, and enforce the award of costs, in the same manner as if such decision and award were made by the surrogate's court.

**Proceedings below after determination of appeal.**

2 R. S., 609, § 97.

# APPENDIX E.

## REMEDY AGAINST DEBTOR HOLDING CONTRACT TO BUY LAND.

SECTION 1. Remedy against land held by debtor under contract for purchase.
2. Interest of defendant may be sold, &c. Specific performance.
3. Interest of defendant, how applied.

**Remedy against land held by debtor under contract for purchase.**

§ 1. The interest of any person holding a contract for the purchase of lands, is not bound by a judgment and cannot be sold on execution; but whenever an execution against the property of such person has been issued on a judgment, and returned unsatisfied, in whole or in part, the execution creditor may bring an action against such defendant, and the party bound to perform such contract, to prevent the transfer of such contract, and to collect the judgment out of the defendant's interest in the contract.

1 R. S., 744, § 4.

**Interest of defendant may be sold, &c.**

**Specific performance.**

§ 2. The interest of the defendant in such contract may be sold by the court, or transferred to the complainant, in such manner and upon such terms as the court deems most conducive to the interests of the parties; and the court has power in such action to adjudge a specific performance of such contract, either in favor of the plaintiff, or in favor of the purchaser, of the interest in the contract be directed to be sold.

1 R. S., 745, § 5.

**Interest of defendant, how applied.**

§ 3. The value of the interest of the defendant holding such contract, must be ascertained by the court; and the same, or so much as necessary, be applied to the payment of the judgment, and the residue applied to the benefit of the defendant.

1 R. S., 745, § 6.